Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1246

STAR BROADCASTING, INC.
CENTRAL STATES BROADCASTING, INC.
STAR STATIONS OF INDIANA, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
INDIANAPOLIS BROADCASTING, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARCUS COHN
MARTIN JAY GAYNES
COHN AND MARKS
1920 L Street, N.W.
Washington, D.C. 20036
202–293-3860

Attorneys for Petitioners

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Star Broadcasting, Inc., Central States Broadcasting, Inc. and Star Stations of Indiana, Inc., Petitioners, respectfully pray that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit in Case Numbers 75-1203, 75-1204, and 75-1205 seeking review of an Order of that Court. The Court of Appeals affirmed without opinion (pursuant to local Rule 13(c)) a decision of the Federal Communications Commission which denied the Petitioners' applications for renewal of license for five radio stations. This case presents important Constitutional questions of Petitioners' rights of due

process under the Fifth Amendment of the United States Constitution and the proper application of the Communications Act of 1934, as amended.

OPINIONS BELOW

The Initial Decision of the Administrative Law Judge was issued on February 14, 1973 (see Appendix 1). The decision of the Federal Communications Commission reversing in pertinent part that decision was adopted on February 7, 1975 (see Appendix 2). The order of the United States Court of Appeals for the District of Columbia Circuit affirming the Commission's decision without opinion was entered on December 11, 1975 (see Appendix 3), and the Court of Appeals' Order denying rehearing was entered on January 20, 1976. Issuance of the mandate was stayed by the Court of Appeals on February 3, 1976 for a 30-day period pending filing of the instant petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Did the Federal Communications Commission err in violation of the Petitioners' due process rights by (a) using an incorrect standard of proof in denying Petitioners' applications for renewal of its radio licenses, and (b) failing to hold a hearing so as to develop a record on the question of improper Congressional influence in the Commission's processes?

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides that the federal government cannot deprive any person of "life, liberty, or property, without due process of law."

STATEMENT OF THE FACTS

The Petitioners herein are, respectively, Star Stations of Indiana, Inc., licensee of Radio Station WIFE-FM, Indianapolis, Indiana; Central States Broadcasting, Inc., licensee of Radio Stations KOIL and KEFM (FM), Omaha, Nebraska; and Star Broadcasting, Inc., licensee of Station KISN, Vancouver, Washington.[1] Authority to operate certain of the above stations dates from as early as 1953; the last acquired station, WIFE-FM, Indianapolis, Indiana, was authorized in 1963.

On October 28, 1964, the applications for renewal of license of Stations WIFE and WIFE-FM were granted for a one year, rather than a three year, period, following a finding by the Commission of operational problems. *Star Stations of Indiana, Inc.*, 3 P&F Radio Reg. 2d 745 (1964). Subsequent to tender of the renewal applications for stations WIFE and WIFE-FM the next year, the Commission designated those applications for hearing on issues relating to the carriage of certain contracts and the billing practices of the stations. After the ensuing hearing, the applications of WIFE and WIFE-FM were granted for a six-month term. *Star Stations of Indiana, Inc.*, 19 F.C.C.2d 991 (1969).

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[1] Each of the Petitioners is a wholly-owned subsidiary of Star Stations, Inc., 92.3% of the stock of which is held by Don W. Burden, the principal officer and director of the parent and the subsidiary corporations. (continued)

The release of the Commission's decision granting license renewals for Stations WIFE and WIFE-FM created a furor in Congress, culminating in a subpoena by the House Interstate and Foreign Commerce Committee of the Commission's confidential files developed in the course of the hearing on those stations. Because the Commission refused to deliver the required documents while the case was *sub judice*, the Chairman of the Commission was voted, in an extraordinary action, to be cited for contempt of Congress. The Commerce Committee also undertook its own investigation not only of Petitioners' radio stations, but also of the manner in which the Commission conducted the Station WIFE and WIFE-FM renewal hearing.

On March 3, 1970, the Commission instituted *sua sponte* an investigatory proceeding (Docket 18807) pursuant to Section 403 of the Communications Act (47 U.S.C. § 403) into the operations of all of the Petitioners' radio stations, a move widely reported in the press as part of an agreement with the House Committee pursuant to which the Committee ended its independent Congressional investigation of the Petitioners and the Commission's regulation of their stations. Commencement of the *Inquiry*, in which the Petitioners were not permitted to fully participate, was sufficient to end the Congressional investigations of the Commission.

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[1] (continued)

Star Stations of Indiana, Inc. is also the licensee of Station WIFE (AM), Indianapolis, Indiana. Station WIFE (AM) was the only station whose renewal faced competition from a third party, Indianapolis Broadcasting, Inc. Certiorari is not here being sought with respect to Station WIFE (AM).

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The *Inquiry* was terminated by Commission adoption on December 2, 1970, of an *Order* designating for evidentiary hearing all of the Petitioners' pending applications for renewal of license, some of which had been held in pending status by the Commission for as many as 2-1/2 years. The hearing *Order* (issued pursuant to § 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 309) specified 19 separate issues, alleging misconduct in the operations of the stations and upon the part of Petitioners' principal, Don W. Burden.

Two allegations were ultimately to become the critical factors in the case: first, in the 1964 Indiana election campaign of Senator Hartke, Burden was alleged to have authorized the presentation of spot announcements for Hartke without charge, an alleged illegal corporate campaign contribution in violation of 18 U.S.C. § 610; second, in the 1966 Oregon senatorial contest between Mark Hatfield and Robert Duncan, Burden was alleged to have distorted the news coverage of the campaign so as to benefit Hatfield. The source of these allegations was, in each instance, a disgruntled former employee; in each case as well, substantial questions were raised by Petitioners concerning the credibility of the complaining witnesses. The allegation concerning Hatfield had actually once been tried in 1966 (contemporaneously with the events) in the Oregon state courts, and Petitioners had been completely cleared of any wrongdoing.

The Commission's hearing sessions and conferences extended over a period in excess of two years; on February 12, 1973 the Administrative Law Judge (ALJ), after a thorough examination of all documents and witnesses, and after having had an opportunity to personally observe the witnesses' demeanor, found no merit in the issues specified by the Commission's 1970 *Order*. The ALJ concluded that the record

was devoid of "strong and unambiguous proof" as to alleged falsehoods committed by Burden, and that the lapse of six to eight years between the events complained of and the hearing had "blurred the memories of honest witnesses," with the result that "[c]onjecture, suspicion and speculation have been substituted for fact." (51 F.C.C.2d at 164). Most significantly, the ALJ rejected the testimony of several principal Commission witnesses for lack of corroboration in light of the serious questions as to the credibility of each of the former Burden employees. The ALJ found that the Commission's Broadcast Bureau "has been forced to rely on certain witnesses who were confused or plainly deceitful" (App. 1, 51 F.C.C.2d at 164).

In sum, the ALJ concluded that the Commission's Broadcast Bureau had failed to meet its obligations to establish a *prima facie* case; in response to the Bureau's theory that Petitioners were required to prove that their licenses should be renewed, the ALJ was certain, unambiguous and emphatic (App. 1, 51 F.C.C.2d at 152-153):

> . . . the presiding Judge has considered, and specifically rejects, the Broadcast Bureau's contention that Star's [Petitioners'] failure to offer affirmative evidence disproving its guilt requires a conclusion that it is, therefore, guilty. While it is true that Star has the ultimate burden of proving that it possesses the requisite qualifications to be a licensee, that burden does not entail the affirmative duty of proving itself innocent of the allegations implicit in the individual issues. The order of designation imposed upon the Bureau

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[2] The Decision of the ALJ (reported at 51 F.C.C.2d 114, *et seq.*) is attached hereto as Appendix. 1.

> the burden of proceeding with the initial presentation of evidence on Issues 1-19. This is not a meaningless burden to be transferred *de facto* to Star through the device of presenting inadequate evidence of guilt but arguing that Star has the ultimate burden of proving that the public interest would be served by a grant of its application. What the burden of proceeding imposes on the Bureau is the duty to put in a *prima facie* case establishing the allegations of the issue. If it fails to do so it has failed to carry its burden of proceeding . . . .
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> * * *
>
> [To proceed otherwise] would be rational only under an adjudicatory system which presumed Star to be guilty until it proved itself innocent. The presiding Judge is unaware of any Commission pronouncement that its hearings are to be conducted under such a distortion of the traditional American concept of justice.

Finding no merit to the allegations raised by the Commission, the ALJ renewed for a full term the licenses of all the Petitioners' stations, with the exception of that for Station WIFE; he determined that the application of Indianapolis Broadcasting, Inc. for those facilities should be preferred on a comparative basis. Exceptions to both the *Initial Decision* and a *Supplemental Initial Decision* were filed by the parties. The Commission heard oral argument on and, on February 7, 1975, issued its final *Decision* in this proceeding (51 F.C.C. 2d 95).[3]

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[3] Attached as Appendix 2 hereto.

The Commission reversed the ALJ's judgment on virtually every issue. Although it found no fault with the facts of record as documented by the ALJ (and accepted his findings as its own), the Commission rejected (*sub silentio*) the notion that its Bureau had any affirmative burden to carry in this proceeding. Without ever explaining why it did so, or why the ALJ's requirement of "strong and unambiguous proof" was erroneous, the Commission applied a "preponderance of the evidence" standard to the record facts and resolved each issue against Petitioners. In short, it adopted a procedural and an evidentiary standard which the ALJ believed to be "a distortion of the tradional American concept of justice." The Commission placed upon the applicant the affirmative duty of proving a negative by proving itself innocent, and it did so despite the absence of "strong and unambiguous proof" of illegality. In what dissenting Commissioner Lee contended was "an unprecedented example of an overdose of justice," the Commission denied each of the Petitioners' applications for renewal of license.

Petitioners appealed to the United States Court of Appeals for the District of Columbia Circuit, which, on December 11, 1975, affirmed the Commission without opinion, under local Rule 13(c). Thus, with no opinion and with no discussion, the Court of Appeals quietly affirmed the severest sanction which the FCC has ever levied upon a broadcast licensee – denial of applications for renewal of license of five radio stations with a monetary loss to Petitioners of almost twenty million dollars, thereby depriving a man of the opportunity of continuing in the industry to which he has devoted a lifetime of work.

But the seriousness of the sanction is not alone sufficient to warrant Supreme Court review. There are at least two questions raised by the instant appeal which are of critical

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importance to the administration of the Communications Act, and to the Petitioners' Fifth Amendment rights: (a) the propriety of the standard of proof which the Commission, under the due process clause of the Constitution, applied in considering its own allegations of misconduct against the licensee; and (b) the effect of the denial to Petitioners of the right to a hearing in which it could develop the question of improper Congressional interference with the work of the agency.

A. Standard of Proof.

The distinction between the standard of proof applied by the Administrative Law Judge and that applied by the Commission in reversing him, presents an issue which, to our knowledge, has never been addressed by this Court and is of critical importance to the application of the Communications Act. It presents the question whether, under due process concepts, the Commission can force an applicant to prove his innocence (*i.e.*, prove a negative) in the absence of strong and unambiguous evidence of wrongdoing when the Commission itself is bringing, and judging, the charges.

The distinction between the ALJ's approach and that taken by the Commission was not a mere formality – it lies at the crux of the case. One example will suffice to demonstrate its impact. The Commission sought disqualification, alleging that Don W. Burden had violated 18 U.S.C. § 610 by directing that $1,000 of corporate funds be sent to Senator Hatfield for his election campaign in 1966. The only witness testifying in support of this allegation was a disgruntled ex-employee who testified that pursuant to Burden's instructions, she had taken $1,000 in cash and anonymously sent the cash to Hatfield's office in an envelope with no covering letter (App. 1, 51 F.C.C.2d 132-22).

But the employee's testimony was flatly contradicted by Burden, and denied under oath by Senator Hatfield, who testified that neither he nor anyone else on his staff ever received $1,000 from Burden; in fact, the Senator did not receive any anonymous donations during the campaign. The story was denied also by the secretary in Senator Hatfield's office who purportedly received the cash; she testified that no one in Senator Hatfield's office had ever received such material. Senator Hatfield's campaign reports were placed in evidence and indicated a listing of over 50 donors of $1,000 or more, all properly reported. In short, there was no evidence that any such contribution was ever received, no evidence as to why Burden would be motivated to make an *anonymous* contribution to Hatfield, no evidence why Burden would not properly acknowledge that he had made such a contribution to the acknowledged candidate of his choice, and no evidence as to why Hatfield would not have properly recorded the donation if it had been received.

Applying what Petitioners believe to be the correct evidentiary standard, the Administrative Law Judge concluded that, at best, the evidence might raise a suspicion of illegality. It did not rise to the level of proof required to sustain the charge. The Commission could not, in the Administrative Law Judge's eyes, rely solely upon the ex-employee's testimony in light of the directly contradictory (and far more probable) testimony of the other witnesses (51 F.C.C. 2d 133). And there is little doubt that if Burden were to be prosecuted directly for criminal violation of 18 U.S.C. § 610,[4] a directed verdict of acquittal would be required under the circumstances, since the charge was clearly not established "beyond a reasonable doubt."

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[4] It should be noted that no such prosecution was ever undertaken.

Yet the Commission reversed the ALJ's judgment, holding, in effect, that since it could point to some evidence (*i.e.*, the ex-employee's testimony) that the money was sent, the Commission was entitled, by application of the "preponderance of the evidence" test, to find that Burden had not disproved his guilt and thus his application was to be denied. And the Commission did so without ever explaining why it chose a different standard of evidentiary proof, or the extent to which it believed that the standard it was applying comports with due process.

Petitioners contend that under the circumstances the use of this standard (and the Commission used it throughout), and the manner in which it was used, is a violation of due process concepts and is precisely what the Administrative Law Judge characterized it to be – repugnant to traditional American concepts of justice.

Petitioners are aware that in licensing matters an applicant bears the burden of persuading the licensing agency that it possesses the requisite character qualifications. But Petitioners also believe that this burden cannot properly include the necessity of proving oneself innocent of criminal charges where these charges are not buttressed by "clear and convincing proof" of guilt. The necessity of such a higher standard is all the more manifest where the applicant has for over twenty years been a broadcast licensee, and loss of the right to broadcast would visit upon him the most catastrophic type of forfeiture.

The propriety of requiring the Commission to use a higher standard of proof than is normally required in civil litigation has been made clear by this Court in a number of cases presenting the question of the appropriate standard to be used where the government seeks to deprive a person of a valuable

right. Thus, in deportation cases,[5] denaturalization cases,[6] and expatriation cases,[7] this Court has recognized that where the government alleges wrongdoing, the result of which would cause serious loss, it could not test the validity of its own allegation merely by a "preponderance of the evidence" test. Although recognizing that it would be improper to require the rigorous "beyond a reasonable doubt" test in such civil litigation, the Court instead found – as a matter of due process – that the appropriate evidentiary standard demands that the allegations be demonstrated by "clear and convincing" evidence. This is, in fact, the test applied by the Administrative Law Judge, and that which should have been applied by the Commission.

Nor is the "clear and convincing" test unique to denaturalization matters. It was applied by this Court as early as 1896 in considering whether the government could terminate pension rights based upon allegations of fraud and misrepresentation by the pensioner,[8] and it was again applied in 1897 when the government sought to set aside a patent it wrongfully issued because of fraud or misrepresentation.[9] It has since been applied in cases concerning punitive damage

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[5] *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276 (1966).

[6] *Schneiderman v. United States*, 320 U.S. 118, 125 (1943).

[7] *Gonzales v. Landon*, 350 U.S. 920 (1955); *see also Nishikawa v. Dulles*, 356 U.S. 129 (1958).

[8] *Lalone v. United States*, 164 U.S. 255, 258 (1896).

[9] *United States v. American Bell Telephone Co.*, 167 U.S. 224, 263-64 (1897).

assessments[10] and in a whole range of civil situations where fraud was alleged as the basis for terminating or depriving a party of a valuable right.[11]

Paradoxically, the "clear and convincing" test has been applied by the Commission's own Administrative Law Judges in cases which arose *subsequent* to the Commission's decision in this case (*In the Matter of the Renewal Application of John Mihoevich,* F.C.C. 75D-63 (November, 1975).[12] In *Mihoevich,* Administrative Law Judge Conlin was considering whether to renew an amateur radio license in the face of an allegation that the applicant had filed a false document, itself a criminal violation of 18 U.S.C. § 1001. Judge Conlin refused to deny the renewal, absent a showing by the government of "clear and convincing" evidence that the misrepresentation had occurred, because of the "serious consequences" which could flow therefrom.

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10 *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967).

11 *E.g.*, (a) allegations of undue influence in contested will cases, (b) assertions of the existence and contests of a lost will or deed, (c) allegations of fraud in gifts or agreements of bequest, (d) allegations of reformation of an instrument for mutual mistake, (e) the impressment of a constructive trust on property, (f) assertion of an oral contract as a basis for specific performance, (g) the impeachment of a notary certificate for fraud, and many more. See 9 Wigmore Evidence, ¶2498, *et seq.* (3d ed. 1940).

12 This opinion has not yet been published in the official reports. A copy is attached hereto for the Court's convenience (Appendix 4). The Court is particularly directed to page 7, paragraph 17, of the opinion for discussion of the proper standard.

The inherently unfair nature of the Commission's approach is highlighted by the fact that the Commission elected to use the least onerous evidentiary standard when it was its very own Bureau that was bringing the charges. In this respect, the nature of the proceeding was more in the nature of a revocation proceeding under § 312 of the Act (47 U.S.C. § 312). By statute (47 U.S.C. § 312(d)), in revocation cases the Commission has the burden of proof; in sucn cases, the Commission has traditionally applied the "clear and convincing" test.[13] Accordingly, it is difficult to understand (and the Commission has nowhere explained) why the standard applied herein should be any different, since in both instances the Commission acts as the judge of charges which its own bureau prosecutes.

Petitioners are aware that the instant case involves an application for renewal of license rather than a revocation. But for purposes of determining the proper standard of proof to be used, this distinction is (as was recognized by the Judge in this case and by Judge Conlin in the *Mihoevich* case) one of form, not substance. Had the Commission desired to do so, it could have instituted revocation proceedings and would then have been required to apply the more stringent test. Instead, by consciously deferring action upon Petitioners' applications for renewal of license until it desired to act, it was able to couch its allegation of wrongdoing in terms of questions affecting renewal applications, and by this device now attempts to justify the use of a less demanding

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[13] *See, e.g., BHA Enterprises, Inc.*, 31 P&F Radio Reg.2d 1373, 1392 (Initial Decision, October 25, 1974): "While the grant of a license vests no right in the licensee, nevertheless the Presiding Judge agrees that a license, once granted, should not be revoked except on the basis of a clear and convincing evidentiary presentation."

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"preponderance of the evidence" test, quite unsuited to the nature of the issue presented.

Petitioners believe that the cases cited make clear that the standard of proof to be used is not a matter of form, but a matter of substance deriving from the nature of the issue presented. The Commission, and the Court of Appeals, did not, Petitioners believe, heed the teaching of those cases. The enunciation of the proper standard to be used in renewal cases where the Commission itself is alleging illegality as a ground for denial, is an important and as yet unsettled question concerning the proper application of the Communications Act, and is a matter upon which this Court should act.

B. Improper Congressional Interference.

This case has been clouded from its inception by the taint of improper political pressure by Congress upon the Commission. Yet, the Commission has refused to develop the requisite full evidentiary record which would enable this Court to carry out its reviewing responsibilities and to be assured that the Commission's processes were not impaired by improper "powerful external influences,"[14] nor subject to "even the probability of unfairness." *In re Murchison,* 349 U.S. 133, 136-137 (1955). *See Amos Treat & Co. v. SEC,* 113 U.S. App. D.C. 100, 306 F.2d 260 (1962).

Congressional interference in this case is clear, beginning as early as 1969 and continuing unabated until the Commission undertook its own investigation. This pressure took many forms, including denunciation of the Commission by

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[14] *Pillsbury Co. v. Federal Trade Commission,* 354 F.2d 952 (5th Cir. 1966).

individual congressmen; citation of the then FCC Chairman for contempt of Congress; investigation, in closed congressional hearings, of FCC staff personnel; and extensive communication between the Commission and the investigating congressional committee. The extent of congressional pressure led the press to speculate openly that the Commission's investigation of Petitioners was undertaken to reduce this pressure.

Although Petitioners timely requested that the Commission enlarge the inquiry so as to develop a fair and full record on whether improper external influence has tainted the Commission's processes, the Commission refused to do so and the Court of Appeals, by its affirmance, did not require the Commission to do so.

Congressional interference with the administrative adjudicatory process is improper, whether such influence is behind closed doors, or in the nature of critical questions and statements made by members of the Subcommittee which has oversight jurisdiction over the agency involved. *Pillsbury Co. v. Federal Trade Co.*, 354 F.2d 952 (5th Cir. 1966). The vice in such improper pressure is that it destroys "the very appearance of complete fairness" appropriate to "an administrative hearing of such importance and vast potential consequences."[15] When indications of improper external political influences are apparent, it is mandatory that the Commission hold evidentiary hearings on the allegations to develop

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[15] *Amos Treat Co. v. SEC*, 113 U.S. App. D.C. 100, 107, 306 F. 2d 260, 267 (1962). *See also D.C. Federation v. Volpe*, 148 U.S. App. D.C. 207, 222-23, 459 F.2d 1231, 1246-47 (1972), wherein Chief Judge Bazelon stated: "With regard to judicial decision-making, whether by court or agency, the appearance of bias or pressure may be no less objectionable than the reality."

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a record so that reviewing courts can scrutinize "with great care" [*SEC v. Holman, Inc.*, 116 U.S. App. D.C. 279, 323 F.2d 284 (1963)] the agency's conclusion that it has met "the basic requirement of due process" with "the very appearance of complete fairness." *Amos Treat & Co. v. SEC*, 113 U.S. App. D.C. 100, 107, 306 F.2d 260, 267 (1962). *See also, Federal Home Loan Bank Board v. Long Beach Federal Savings and Loan Assn.*, 295 F.2d 403, 408-409 (9th Cir. 1961); *WKAT, Inc. v. FCC*, 103 U.S. App. D.C. 324, 258 F.2d 418 (1958); *Mass. Bay Telecasters v. FCC*, 104 U.S. App. D.C. 226, 261 F.2d 55 (1958); *WORZ, Inc. v. FCC*, 106 U.S. App. D.C. 14, 268 F.2d 889 (1959).

The nature of the relationship between Congress and the Commission is peculiarly close. While there is certainly nothing improper in congressional supervision of Commission activities, such supervision can easily drift into a posture of improper external influence. Petitioners suggest that this may have happened in this case and that at least a *prima facie* case has been made to require evidentiary investigation into the matter. This also is a question which deserves review and explication by this Court, and an issue which was not addressed in the Rule 13(c) affirmance by the Court of Appeals.

CONCLUSION

WHEREFORE, in view of the seriousness of the issues here raised, and their importance to the agencies and the public in their resolution, Petitioners respectfully request that a writ of certiorari be issued to review this matter.

Respectfully submitted,

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Marcus Cohn

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Martin J. Gaynes

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APPENDIX 1

FCC 73D-6

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
STAR STATIONS OF INDIANA, INC.	
For Renewal of Licenses of WIFE and WIFE-FM, Indianapolis, Ind.	Docket No. 19122 Files Nos. BR-1144, BRH-1276
INDIANAPOLIS BROADCASTING, INC.	Docket No. 19123
For a Construction Permit for a Standard Broadcast Station, Indianapolis, Ind.	File No. BP-18706
CENTRAL STATES BROADCASTING, INC.	Docket No. 19124
For Renewal of Licenses of KOIL and KOIL-FM, Omaha, Nebr.	Files Nos. BR-516, BRH-992
STAR BROADCASTING, INC.	Docket No. 19125
For Renewal of License of KISN, Vancouver, Wash.	File No. BR-1027

APPEARANCES

Marcus Cohn, *Joel H. Levy*, and *Martin J. Gaynes* on behalf of Star Stations of Indiana, Inc., Central States Broadcasting, Inc., Star Broadcasting, Inc. and Don W. Burden; *Robert W. Coll* and *John L. Tierney* on behalf of Belk Broadcasting Co. of Florida, Inc.; *A. Robert Cherin*, *Thomas M. F. Christensen*, and *Walter H. Sweeney* on behalf of Indianapolis Broadcasting, Inc.; *R. David Garber* on behalf of witness Dorothy Storz; and *Thomas B. Fitzpatrick*, *Charles W. Kelley*, *Joseph Chachkin* and *John T. Kelly* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
CHESTER F. NAUMOWICZ, JR.

(Issued February 8, 1973; Released February 14, 1973)

PRELIMINARY STATEMENT

1. By order adopted December 2, 1970, the Commission consolidated the above-captioned applications for hearing on the following issues:

1. To determine whether the licensee, in the rates charged on Station WIFE in 1964 for advertising by or in support of candidates for public office, violated Section 315 of the Communications Act of 1934 and/or the provisions of Section 73.120(c) of the Commission's Rules and Regulations.

2. To determine whether Stations WIFE and WIFE-FM were operated in 1964 in accordance with the licensee's obligations under the fairness doctrine.

3. To determine whether, in 1964, the licensee of Stations WIFE and WIFE–FM violated 18 U.S.C. 610 by providing free broadcast time to a candidate for the United States Senate.

4. To determine whether, in 1964, the licensee deliberately slanted or distorted its news broadcasts on WIFE or WIFE–FM, or deliberately presented the news in such a manner as to favor one qualified candidate for public office over his opponent.

5. To determine whether the licensee of Stations WIFE and WIFE–FM filed with the Commission true, complete and accurate Political Broadcast Reports (FCC Form 322) for the primary and general election campaign of 1964.

6. To determine whether the licensee of Stations WIFE and WIFE–FM was evasive, lacking in candor or misrepresented facts in connection with Commission inquiries concerning matters set forth in (1) through (5), *supra.*

7. To determine whether Station KISN was operated in 1966 in accordance with the licensee's obligations under the fairness doctrine.

8. To determine whether, in 1966, the licensee deliberately slanted or distorted KISN news broadcasts, including news promotional announcements, or deliberately presented the news in such a manner as to favor one qualified candidate for public office over his opponent.

9. To determine whether Star Broadcasting, Inc. and/or its principals violated 18 U.S.C. 610 by making a corporate contribution in 1966 to a candidate for the United States Senate.

10. To determine whether the licensee of Station KISN was evasive, lacking in candor or misrepresented facts in connection with Commission inquiries concerning matters set forth in (7) through (9), *supra.*

11. To determine the facts and circumstances surrounding the 1966 request for Star Broadcasting, Inc. for local zoning approval of its proposed construction of antenna towers at the KISN antenna site, including any plans of the licensee to make payments to public officials in connection with such request.

12. To determine whether the licensee of Station KISN was evasive, lacking in candor or misrepresented facts in connection with Commission inquiries concerning the 1966 zoning request.

13. To determine the facts and circumstances surrounding the grant of gifts and/or favors by Star Stations, Inc. and/or its principals to officials of C. E. Hoopers, Inc.

14. To determine the facts and circumstances surrounding the interception or monitoring of any telephone calls of government witnesses by the applicant for WIFE or by persons acting on applicant's behalf during or preceding the Commission hearing on renewal of license of Stations WIFE and WIFE–FM.

15. To determine the facts and circumstances surrounding the filing by Star Stations, Inc. and/or its principals of a claim for property alleged to have been lost or destroyed as the result of a fire in Omaha, Nebraska, in 1965 or 1966, and whether such claim was false or fraudulent.

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16. To determine whether in connection with the "Grocery Boy Contest", Central States Broadcasting, Inc., failed to file with the Commission within 30 days of the execution thereof, copies of contracts relating to the sale of broadcast time to "time brokers" for resale, in violation of Section 1.613(c) of the Commission's Rules.[1]

17. To determine whether any or all of the licensees have failed to supervise the conduct and presentation of contests in a manner adequate to protect the public from deception as to the ways in which winners of contests were determined, and whether in their broadcasts regarding contests, any or all of the licensees have misled the public as to the number, nature or value of prizes to be awarded.

18. To determine the method of accounting of Stations WIFE, WIFE–FM, KOIL, KOIL–FM and KISN relative to national trade-outs during the period 1964 to date; the purpose for such procedures and whether this in any way resulted in the concealment of revenue derived from national trade-outs.

19. To determine whether Star Broadcasting, Inc. and/or its principals and agents have engaged in efforts to coerce, harass, and intimidate employees and former employees of Stations WIFE, WIFE–FM, KOIL, KOIL–FM and KISN, for the purpose of frustrating or interfering with the Commission's processes.

20. To determine in light of the evidence adduced pursuant to the foregoing issues and the fact that short-term renewals for WIFE AM–FM were granted (see 3 RR 2d 745, FCC 64–949) by Commission action on October 28, 1964 and September 17, 1969 (see 19 FCC 2d 991), whether the applicants for renewal of Stations WIFE, WIFE–FM, KOIL, KOIL–FM and KISN possess the requisite qualifications to be and remain licensees of the Commission.

21. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of any of the captioned renewal applications would serve the public interest, convenience and necessity.

22. To determine, in the event the applicant of Station WIFE is not disqualified, whether a comparative demerit or demerits should be assessed against it in this proceeding.

23. To determine with respect to the application of Indianapolis Broadcasting, Inc.:

(a) Whether Jerry L. Kunkel has sufficient funds to meet his stock purchase commitment;

(b) Whether the applicant can raise the $250,000 in unencumbered capital upon which its bank loan is contingent; and

(c) Whether, in light of the evidence adduced pursuant to (a) and (b), above, the applicant is financially qualified.

24. To determine which of the mutually exclusive applications for a license to operate a standard broadcast station in Indianap-

[1] By order released April 16, 1971 the Commission authorized consideration of forfeiture up to $10,000 as an appropriate sanction in the event of an adverse conclusion of this issue.

olis, Indiana, would better serve the public interest, convenience and necessity.

[2] 28. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the captioned applications should be granted.

On December 3, 1970, the Broadcast Bureau filed a Bill of Particulars further identifying the specific matters at issue.

2. The order of designation, as amended by order released March 2, 1971, directed that this hearing be presided over by the same Examiner who presided over the hearings on renewal of license for Station WPDQ, Jacksonville, Florida. The Examiner was directed in this proceeding to "take cognizance of any findings of fact (in the WPDQ proceeding) which bears upon the qualifications of the licensee or licensees in this proceeding". Accordingly, the Examiner's Initial Decision in the WPDQ matter, *Belk Broadcasting Co. of Florida, Inc.*, FCC 720-31, #84545, released May 12, 1972, is incorporated by reference insofar as its findings and conclusions relate to the activities of the Star Stations, their principals or employees.

3. On April 7, 1971, the Review Board released an order adding an issue (here renumbered No. 25):

> 25. To determine whether the programming of Stations WIFE, WIFE-FM, KOIL, KOIL-FM and KISN has been meritorious, particularly with regard to public service programs.

On April 21, 1972, the Review Board released another order adding further issues (here renumbered Nos. 26 and 27):

> 26. To determine whether Indianapolis Broadcasting, Inc. has failed to comply with the provisions of Sections 1.514 and/or 1.65 of the Commission's Rules, and, if so, to determine the effect of such non-compliance on the applicant's basic or comparative qualifications to be a Commission licensee; and
>
> 27. To determine whether Indianapolis Broadcasting, Inc. misrepresented facts to the Commission, and, if so, whether such conduct reflects adversely on the basic or comparative qualifications of Indianapolis Broadcasting, Inc. to be a Commission licensee.

4. The original order of designation indicated that the proceeding was to be governed by the then applicable Policy Statement regulating comparative/renewal proceedings. By order released August 20, 1971 the Commission deleted reference to the Policy Statement, and by order released February 24, 1972, the applications were redesignated for hearing on the previously specified issues. At a conference convened on April 19, 1972, the parties stipulated into evidence in the redesignated proceeding the entire record theretofore made, reserving only the right to supplement that record to the extent they deemed desirable.

5. The applicants published notice of the hearing and notified the Commission thereof pursuant to the governing statute and rules. Con-

[2] This issue has been renumbered to accommodate issues subsequently added.

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ferences and hearing sessions were held on various dates between December 15, 1970 and January 5, 1973, the record being finally closed on the later date. The filing of proposed and reply findings of fact was concluded on January 26, 1973.

FINDINGS OF FACT

6. The Star Stations group consist of Star Stations of Indiana, Inc., licensee of WIFE and WIFE–FM, Indianapolis, Indiana; Central States Broadcasting, Inc., licensee of KOIL and KOIL–FM, Omaha, Nebraska; and Star Broadcasting, Inc., licensee of KISN, Vancouver, Washington. Each of the corporate licensees is a wholly owned subsidiary of Star Stations, Inc.

7. The principals of the several corporations, their offices, and their equities in the parent corporation are as follows:

a) Don W. Burden: Chairman, President, Director and 92.3% stockholder of Star Stations, Inc.; and Vice President, Director of each of the licensee corporations.

b) Tom Devaney: Executive Vice President and Director of Star Stations, Inc.

c) Gerald F. Weist: Vice President, Director and 3.8% shareholder of Star Stations, Inc. Former Vice President and Director of each of the licensee corporations.

d) Marvin Schmid: Director of Star Stations, Inc.

e) Lester Steffen: Secretary/Treasurer of all four corporations.

f) Thomas L. Davis: Director of all four corporations and 0.9% stockholder of Star Stations, Inc.

g) Steve Shepard: Vice President of Star Stations, Inc., President of Star Broadcasting, Inc., and Vice President of Central States Broadcasting, Inc. Until recently he was a 1% stockholder of Star Stations, Inc. and General Manager of KISN. He is now National Sales Manager of Star Stations.

h) Robert D. Kiley: 1.14% shareholder of Star Stations, Inc., President and Director of Star Stations of Indiana, Inc., and General Manager of WIFE.

i) Estate of John F. Davis: 0.3% shareholder of Star Stations, Inc. Davis was a former director of all four corporations.

j) Jennette Davis: 0.2% shareholder of Star Stations, Inc.

k) Carol D. Wells: 0.9% shareholder of Star Stations, Inc.

l) W. David Wells: 0.2% shareholder of Star Stations, Inc.

m) Jack Marsella: Vice President of Star Stations of Indiana, Inc.

n) Doyle Peterson: Vice President of Star Broadcasting, Inc. and General Manager of KISN.

o) Sol Rosinsky: President and Director of Central States Broadcasting, Inc. and former Vice President of Star Stations, Inc.

p) W. O. Johnson: Vice President of Central States Broadcasting, Inc.

q) R. C. Hensky: Vice President of Central States Broadcasting, Inc.

r) Steven D. Brown: until March 13, 1972 a Vice President and 1% shareholder of Star Stations, Inc.

8. KOIL, the first of the present Star Stations, was acquired by Central States Broadcasting Co. in 1953. KISN was acquired in 1959, and WIFE in November, 1963.

9. The first renewal application for WIFE by Star Stations of Indiana was granted on October 28, 1964, but on a short term basis until August 1, 1965. The Commission's reasons, as set forth in *Star Stations of Indiana, Inc.*, 3 RR 2d 745, centered on the station's use of audience ratings in a misleading fashion in order to improve sales of air time.

10. The next renewal application was filed in May of 1965, and resulted in a hearing. On September 17, 1969 the Commission adopted a decision, *Star Stations of Indiana, Inc.*, 19 FCC 2d 991, in which it found that the station had conducted contests and billed advertisers in an improper manner. Nevertheless, the Commission again granted renewal. This time for a 6-month period. WIFE's next renewal application led to the order of designation which initiated this proceeding.

Issue No. 1: Section 315; Rule 73.120(c)

11. In 1964 Vance Hartke was a candidate for the United States Senate from Indiana. Contacts were established between WIFE and the Ruben Advertising Agency of Indianapolis acting on behalf of Senator Hartke. These contacts led to four contracts signed on behalf of the station by its general manager, Ronald M. Mercer, and on behalf of Ruben by Donald Love, media buyer handling the Hartke account. The first contract, signed on August 10, 1964, called for one 15-minute broadcast on September 8, 1964 at $250. The second, signed on September 8, 1964 called for thirteen 5-minute programs to be broadcast on September 12, 1964. Eight were to be in Class A time at $75, and five were in Double A time at $100. The third contract, signed on October 5, 1964, specified four 5-minute programs for October 6, 1964 at $75. The final contract, signed on November 2, 1964 called for three 5-minute programs to be broadcast on that date at $75 plus a $5 production charge. All of the contracts purport to be based on WIFE Rate Card 1–B. However, neither that rate card, nor any other WIFE rate card then in existence specifies rates for either political or commercial broadcasts of 5 or 15 minute duration.[3]

12. The exact basis for the rates specified in the four contracts is unclear. No documentation survives and the memories of the participants are vague.[4] Apparently, Mercer consulted Burden and an *ad hoc*

[3] The failure to specify program rates is less surprising than would at first appear. Since the 1940's commercial sponsorship of radio programs, as such, has been the exception. The common practice has been for advertisers to purchase "commercials" of various lengths, usually one-minute or less, to be inserted into the station's programming. If political broadcasts were to be equated to "commercials" the lack of a rate card would be even less surprising, since the Commission has never looked with favor on commercial spots of either 5 or 15-minute duration.

[4] This finding implies no adverse criticism of the witnesses. Their testimony, given in 1971 and 1972, involved events which transpired a number of years previously. Common experience with human recollection suggests that details or even entire incidents may be forgotten or remembered incorrectly after the passage of so much time.

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rate card was set up for political broadcasts in excess of one minute. These rates were to apply to any political candidates who might seek time, but no one now recalls how the rates were arrived at. However, Washington communications counsel was consulted, and on August 20, 1964,[5] he sent Mercer a letter advising of the station's legal obligations in the matter. In any event, the record does not indicate that any other political or commercial sponsor was charged different rates for comparable time, or, indeed, that any other political or commercial programs of 5 or 15-minute length were broadcast during or about the time period involved.

Issues 2 and 3: Political Spot Announcements

13. On September 21, 1964 WIFE entered into a contract with the "Senator Hartke Democratic Campaign Committee" for $5,890 worth of spot announcements. The agreement called for 310 60-second spot announcements to run for 44 days, 50 times per week, at $19. The contract was signed by Ronald Mercer on behalf of WIFE, and by Edward D. Lewis, an Indianapolis attorney, on behalf of the committee. The broadcast order indicated that the Ruben Advertising Agency was acting for the committee, and that its executive handling the account was Donald Love.

14. The contract was not prepaid, but the spots were run as specified. Some half-year later, in May of 1965, when no payment of any kind had been made on the contract, the station wrote off the balance of $4,058 remaining on its books.[6] The decision to write off the account was either made by Burden or he acquiesed in it, and he decided not to file suit against either Senator Hartke or those purporting to represent him in the matter.

15. In December of 1969 Senator Hartke's office requested that a bill covering the spots be submitted. At that time the WIFE logs for September of 1964 were no longer available, and the new bill covered only the October and November spots which could actually be verified as having been broadcast. This bill, in the amount of $3,265, was paid in May of 1970.

16. The foregoing facts are undisputed. However, the circumstances surrounding them and the motives of the individuals involved are the subject of sharp controversy. Part of the disagreement may well be attributable to the dimming of memory through the passage of time. However, the dispute as to the central facts can only arise from deliberate falsification on the part of one or more witnesses. Hence, the testimony of each material witness must be examined in some detail before decisional findings can be formulated.

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[5] Thus, WIFE had the benefit of counsel with respect to the rates specified in the last three contracts. Whether that advice governed the first contract cannot be ascertained because, although the lawyer's letter was dated ten days after the first contract was signed, it states that it is for the purpose of confirming advice given at a prior unspecified time.

[6] The record does not truly clarify the discrepancy between the $5,890 contract and the $4,058 write-off. While the amount due the station was reduced by the 15% agency commission WIFE assumed was due to Ruben, that accounts for only $883.50, reducing the balance due WIFE to $5,006.50. Here again, the documents relating to the matter are ambiguous, and the passage of time has so blurred the recollection of the participants that they are uncertain of just what they did, much less why they did it. However, the discrepancy does not seem to be material. The central point is that six months after the spots were broadcast WIFE wrote off the entire receivable which it deemed attributable to them.

17. Turning first to the evidence supporting the version of events advocated by the Broadcast Bureau, the principal witness is Ron Mercer. In substance, Mercer asserts that Burden called him "one morning after the newspaper had printed an article on the trouble he was having with [the FCC] on surveys".[7] Burden told Mercer that "Hartke wanted to help him on his FCC problem if WIFE would give him publicity on each newscast and run some free advertising". About ten days later Burden saw Mercer in Indianapolis and told him that he had met with Senator Hartke "and that because of Hartke's association with the Commission, [Hartke] was going to help [Burden]". Burden told Mercer "to send the necessary papers to Hartke's office via Bob Kiley or [Mercer] and they would find a 'patsy' to sign them". On the same morning Mercer asserts that he was called by Elmar Ruben of Ruben Advertising who "said the same thing as Burden did". Ruben then said that "he knew about the deal Burden had with Hartke and that one of Hartke's friends would sign the papers but that [Ruben Advertising] would do the production work".

18. Mercer then "sent Bob Kiley down to Hartke's office and he came back with the necessary papers signed by [Senator Hartke's Administrative Assistant] Mace Brodie". On receipt of the signed contract "Burden blew his stack", and said that the papers could not be signed by anyone connected with the Hartke campaign. Whereupon, Mercer asserts, "Burden called Hartke and Hartke came up with the name Ed Lewis". Mercer then took Kiley to see Lewis. They told Lewis that the contract was supposed to be signed by him "so it could not be traced to Hartke personally". Lewis then told them that he knew about the matter from Senator Hartke, and signed the contract.

19. Finally, Mercer states that the spots were run as specified in the contract, "and Ruben received a bill several times".[8]

20. Mercer's testimony, however, must be viewed with reservations. Aside from the fact that his own story makes him a willing party to a conspiracy to violate 18 USC 610, the record demonstrates that he views lightly the giving of false testimony under oath. Moreover, this record contains evidence that Mercer has given false and misleading testimony for the obvious purpose of damaging Don Burden.

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[7] The record does not disclose the date of the newspaper article which supposedly engendered the incident, and the point is important. The contract in question was executed on September 21, 1964. However, the Commission's action relating to WIFE's surveys was not taken until October 28, 1964. There is nothing in the record to indicate that the Commission's concern with the matter had been made public prior to that date. Moreover, the action of October 28, 1964 indicates that it was taken on the basis of correspondence between the Commission and the licensee, and it is not the Commission's usual practice to make such correspondence public prior to the announcement of its action taken thereon. Thus, the record contains neither proof nor presumption that the matter was actually publicized prior to October 28, 1964, and it became vital for evidence to be adduced demonstrating that there actually was newspaper coverage of the matter prior to September 21, 1964. Without such proof Mercer's assertion of motive for the alleged Burden/Hartke agreement lacks plausibility.

[8] The quotes in paragraphs 17 and 18 are from a June 16, 1966 letter from Mercer to an attorney for the Broadcast Bureau. Since then Mercer has testified in an FCC investigatory hearing, at a discovery deposition conducted by Star, and in this hearing. In his various statements there are some minor discrepancies as to details. However, there is no reason to believe that these variances are more than trivial failures of recollection occurring when he has described the same events on a number of occasions over a period of years. The textual findings represent the essential thrust of his story and that has remained unchanged. It is found that his testimony is not suspect because of his slightly changing recountation of details. However, this is not to say that Mercer's testimony is accepted at face value. The reasons therefor are detailed at paragraphs 20–25, *infra*.

21. As noted at paragraph 10, *supra*, WIFE's 1965 renewal application was designated for hearing. Mr. Mercer was an important witness. Prior to the hearing he swore to an affidavit the thrust of which was that he alone was responsible for certain improprieties which occurred while he was manager of the station. At the hearing itself he recanted the affidavit and asserted that his actions had been taken on Burden's directions. Whichever version is correct,[9] it is apparent that on one occasion or the other he demonstrated a willingness to swear falsely.

22. Nor can it be found that even yet he recognizes the seriousness of his action. In the course of this hearing he testified that he did not regard himself as an "admitted liar" because at the time he swore to the false affidavit he was only doing "a personal favor to Don Burden". Even allowing for the agitation he must have felt at being called an "admitted liar", the claim that a false affidavit is somehow less culpable because given as a "personal favor" does not inspire confidence in the sanctity with which he regards his oath.

23. Moreover, Mercer's continuing willingness to give false testimony was established on this record. He described a series of incidents designed to harass him.[10] He attributed those incidents to Don Burden. When asked "do you have any knowledge of anyone else who you knew who you've had past dealings with, other than Mr. Burden, who would have any reason to do these things", he replied, "none at all".

24. Subsequently, testimony was received from one Charles M. Pitman. It was developed that Pitman and Mercer had been involved in a dispute entirely unrelated to Star or Burden. In the course of the dispute Pitman conducted an investigation of Mercer, both on his own and through a private detective. Some or all of the incidents set forth at footnote 10, *supra*, were the products of this investigation. Most importantly, prior to the time Mercer testified in this proceeding Pitman had discussed the investigation and its incidents with him. Thus, when Mercer swore in this hearing that he attributed his harassment to Burden and that he knew of no one else who might be responsible he swore falsely.[11] The demeanor of both Mercer and Burden throughout the hearing made it plain that there is severe animosity between the two and Mercer's false testimony is, therefore, attributed to malice toward Burden.

25. In sum, it is found that Mercer is willing to bear false witness if he deems it to suit his own ends, and that he holds a spirit of malice

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[9] Possibly he lied in the affidavit and had seen the error of his ways by the time he testified. Possibly he gave a true affidavit and testified falsely out of spite against Burden who by that time had terminated his employment at WIFE. Each possibility is equally plausible, and it is unnecessary to reach a conclusion as to which is true. The important point, for the purpose of evaluating his testimony in this hearing, is that on one occasion or the other he freely bore false witness.

[10] The manager of a company owned by Mercer received telephone calls "prying into my personal business and financial status, and business transactions that I've had with different people". His wife and secretary received anonymous calls "at all hours of the night" inquiring as to his business dealings. His ex-wife and a friend resident in distant cities "received phone calls along the same vein". Over a period of three or four months automobiles would drive slowly past his house at night without lights causing concern and comment among his neighbors. Another ex-wife received telephone inquiries purportedly in connection with a job application he had made, although, in fact, he had not applied for the job.

[11] Mercer was not recalled to refute Pitman's testimony, which, therefore stands uncontradicted. Indeed, the failure to attempt to rebut such patently vital testimony raises the inference that rebuttal is not possible.

toward Burden. His testimony against Burden is not to be accepted absent firm corroboration.

26. No witness was offered professing to have direct knowledge of the controverted portions of Mercer's testimony. However, the testimony of Mrs. Dorothy Storz, then bookkeeper of Star Stations, Inc. and Secretary-Treasurer of all four corporations, was offered for indirect corroboration.

27. Among Mrs. Storz' duties as bookkeeper was the preparation of monthly cash flow statements for each of the Star stations. She asserted that in October of 1964 Burden instructed her to prepare a second cash flow statement for WIFE identical to the regular statement except deleting any projected income from the Hartke spots. The second statement was prepared in order that Burden and Mercer "would know the exact amount of income that could be expected from the station", and because "[the Hartke spots] were to have been deleted from the income from the station when [Mercer] received his commission from the station". Mrs. Storz did not have a copy of this "second" cash flow statement, testifying that Burden ordered them destroyed in 1967.

28. Insofar as contemporary records survive they do not support Mrs. Storz' recollection. Mercer's 1964 commission, in fact, included the sum attributable to the Hartke spots which had not yet been written off by the station.[12] The computations establishing the commission are in Mrs. Storz' own handwriting. Thus, it would appear that Mrs. Storz' contention that one of the reasons for the "second" cash flow statement was as a tool to calculate in October 1964 Mercer's true 1964 commission is incorrect.

29. The second motive she assigns, to enable Mercer and Burden to know the station's real income expectations, is flimsy. Either man would be quite capable of making a mental deduction from the ordinary cash flow statement of the $6,000 attributable to the Hartke spots. It would have been irrational for either of them to order the production of a potentially incriminating document simply to do for them a sum either could easily do in his head. It is found that Mrs. Storz' recollection of the incident is not sufficiently clear absent corroboration, and that corroboration is completely lacking.[13]

30. No other witness gave testimony even suggesting that Burden was a party to a scheme whereby the Hartke campaign would receive what were, in effect, free spots. However, the collective thrust of the testimony establishes with reasonable certainty that such a scheme did exist.

31. The contract in question differed on its face from the unquestionably legitimate contracts discussed at paragraphs 11–12, *supra*, only insofar as it was signed on behalf of the buyer by Edward D. Lewis

[12] When the spots were written off in 1965 Mercer's 1965 commission account was debited the amount advanced in anticipation of payment on the Hartke spots.

[13] An attempt was made by Star to impeach Mrs. Storz by showing an alleged motive for her to be biased against Don Burden. For reasons stated on the record the Examiner found the alleged grounds for bias to be insubstantial and ordered that portion of the record dealing with the attempted impeachment to be sealed. The sealed record is, of course, available to those who may review this Initial Decision, and the parties may preserve the seal by pleading to this portion of the record in supplementary documents, themselves under seal.

rather than by Donald Love.[14] A more important difference, not apparent on its face, was that this contract alone of the five was not paid in advance of the broadcasts it called for. However, the "Agreement Form For Political Broadcasts", signed by Lewis and initialed by Mercer, contained the false typewritten statement that "the advance payment for the above-described broadcast time has been furnished by Sen. Hartke Dem. Campaign Comm."

32. Lewis was not then and had never been an officer or director of either the "Senator Hartke Democratic Campaign Committee" or the "Indiana Democratic State Central Committe". In fact, in 1964 he held no position in any campaign organization, and his only political action throughout the campaign was to sign the contract in question. As an attorney he must have known that if he purported to buy on behalf of a committee which he had no authority to represent, he would be personally liable if the committee did not pay. Hence, elementary prudence must have dictated that he had some assurance from someone that he was not going to be held responsible on the contract.

33. Just what assurance Lewis had is a matter of controversy. Mercer says that he himself assured Lewis at the time the contract was signed that he would not be held accountable. This is possible, although Lewis does not recall it, but it is improbable that it was the only assurance which Lewis received—an attorney given to accepting the statement of a perfect stranger that "I want you to sign this contract but I'll never hold you to it" is unlikely to remain long in practice.

34. It is more realistic to believe that Lewis was reassured by someone he trusted. Since he had been a Hartke supporter for 20 years he must have reposed greater trust in the Hartke camp than in the strangers representing WIFE.

35. It is unnecessary to reconcile the somewhat conflicting accounts of the participants as to just what conversations took place between Mr. Lewis and others acting on behalf of Senator Hartke which led Lewis to believe that he would never be held personally liable.[15] No one admits to any "deal" having been made with Burden or to knowing in advance that the spots were never to be paid by anyone. It cannot be found with reasonable certainty whether Lewis was an innocent or a knowing tool when he signed the contract. However, it matters not for it is not the Commission's function to consider sanctions against anyone other than its licensees. The circumstances surrounding the

[14] According to the contract, Lewis purports to be acting on behalf of the "Senator Hartke Democratic Campaign Committee". No such committee existed in 1964. However, this apparently crucial fact loses significance in light of the companion fact that 3 of the 4 legitimate contracts between WIFE and the Hartke campaign also purport to be signed on behalf of the "Senator Hartke Democratic Campaign Committee. The fourth legitimate contract, that of November 2, 1964 which was the last one executed, was drawn up in the name of the same committee, but that name was scratched out by Mr. Love and the name of the "Indiana Democratic State Central Committee" was substituted. The latter committee is the actual one which was coordinating Senator Hartke's campaign, and the one for which Mr. Love was really working. Apparently, when WIFE drew up the contracts it modeled them on those used in 1958, and overlooked the fact that the name of the committee had changed, and the error wasn't caught until the last contract was submitted to Love on November 2. Thus, it would seem probable that the naming of the wrong committee in the "spots" contract was the product of the same error rather than evidence of a more sinister intent.

[15] Lewis claims he received a call from Mace Broide, Senator Hartke's administrative assistant, who asked him to sign a contract for radio time with WIFE. Lewis did not recall that they discussed payment, but he assumed it would be taken care of by one of the Hartke campaign committees. Broide remembers the conversation more or less the same way, but says he was under the impression that Lewis would have the "Hoosiers for Hartke" committee, which Lewis headed in 1958, pick up the bill.

contract reek of fraud, and by his own admission Mercer was privy to it. However, the testimony of none of the persons on the buyer's side of the contract sheds any light on the vital question for the Commission: was Mercer acting under Burden's direction or was he on a frolic of his own?

36. Turning to consideration of the facts surrounding the billing for the spots, greater suspicions arise as to Burden's participation. The "Broadcast Order" [16] on the contract which was drawn up on September 21, 1964, indicated that it was to be billed to the Ruben Advertising Agency, and that the spots themselves were already recorded.[17] The bills were in fact sent to the Ruben agency monthly until the spots were written off. However, there is no evidence indicating that the agency ever responded to the bills in any way until May 7, 1965. By that time WIFE's auditors were going over the station's books and had written the Ruben agency to inquire as to the overdue bill. On May 7 Ruben replied denying that they had placed the order for the spots. Thereupon, the account was written off the WIFE books with no further effort being made to collect from anyone. The actual decision to write off the account was made by Mercer with Burden's concurrence.

37. Several of the foregoing facts are unnatural, and cannot be satisfactorily explained unless knowledge on Burden's part is presumed. Burden denies knowing of the contract in question until May of 1965 when discussion arose as to whether to write it off as a bad debt. He suggests that his participation in the write-off decision was *pro forma* without any real consideration of the facts in the case or any investigation of the efforts theretofore made to collect.

38. If this is true, Burden's actions in this instance would be entirely uncharacteristic of what Star claims to be his ordinary performance. Star has introduced evidence directed to the comparative issue demonstrating that Burden participates very actively in the management of all of the Star stations. He visits them all frequently; he telephones often; and he demands regular, detailed reports. He participates in all of the significant decisions made at all of his stations. It is difficult to believe now, as Mercer would have found it difficult to assume then, that a $6,000 receivable would be written off without Burden's close scrutiny.

39. Yet, that is precisely what Mercer would have to assume if he actually entered into the Lewis contract without Burden's consent. He would have to assume that Burden would never ask him why the contract referred to advance payment when no such payment was made. He would have to assume Burden would never contact Lewis and whoever Lewis would say authorized him to sign the contract. He would have to assume that Burden would never contact Senator Hartke, although Mercer knew the two were acquainted, to inquire why the Senator's committees didn't pay their bills. Absent these assumptions,

[16] The "Broadcast Order" is a routine internal order drawn up at WIFE on each advertising contract for the purpose of alerting the traffic, continuity, production and accounting departments to take suitable action.

[17] This almost certainly means that the spots included those which had been previously produced by the Ruben Advertising Agency. However, the fact is without significance, because a substantial number of tapes of the spots were in existence, and WIFE could have received its copy from one of a multitude of sources.

Mercer would simply have to assume that Burden was going to discover that Mercer had entered into a deal contrary to law which inevitably placed the station's license in the gravest jeopardy. In short, the circumstances surrounding Mercer's actions are completely incomprehensible unless Mercer was acting with Burden's consent.

40. Nor is it easy to understand Burden's actions when the Ruben Advertising Agency disclaimed the bill for the Hartke spots. Accepting, *arguendo*, Burden's claim that he did not regard it as wise for a businessman holding a license from a federal agency to vigorously attempt collection of a debt from a United States Senator, his total inaction is not thereby explained. When the Ruben agency disclaimed the bill, he cannot truly have believed that he might be suspected of harassing Senator Hartke if he made inquiries of Lewis or even if he sought an explanation from the Senator himself. His immediate concurrence with Mercer's decision to write off so large a receivable without even endeavoring to ascertain why Ruben refused to acknowledge the account creates the suspicion that he had not intended to collect the account in the first place.

41. Moreover, WIFE's relations with the Ruben Agency on this account appear to have been somewhat irregular. Accepting the fact that Ruben was being billed regularly each month,[18] it follows that between October 1964 and May 1965 WIFE was confronted with the fact that a substantial bill was simply being ignored by a local advertising agency. It is incredible that nothing was done about such a situation. Advertising agencies depend for their very existence on credit with media outlets. It is inconceivable that WIFE would have permitted the situation to continue for eight months without even inquiring why the bill was not being paid. In view of Burden's insistence on frequent and detailed financial reports from his stations, it is difficult to understand how he could have been unaware of the situation, and why he did not demand an explanation prior to May of 1965.

42. Nevertheless, the circumstances set forth at paragraphs 37–41, *supra*, do not rise to the level of proof. They simply create suspicions that Burden knew more at the time that he now admits. Such circumstances would furnish corroboration if Mercer had been found to be a credible witness. However, he has not, and suspicions cannot be substituted for proof, especially since the circumstances are also consistent with the theory that Burden was acting out of trust for Mercer who was, in fact, duping him.

43. On the basis of the foregoing it is found that WIFE was committed to broadcast the Hartke spots without any real expectation of payment, and that Ron Mercer knew of the fact at the time. However, the weight of the evidence does not support a firm finding that Don Burden was party to or cognizant of the arrangement at the time the spots were broadcast.

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[18] Mr. Elmar Ruben testified that he never saw the bills, although all bills to the agency were supposed to cross his desk. However, this testimony does not warrant a finding that the bills were not sent. Everyone connected with WIFE who testified on the matter claimed to either know or have reason to believe that the bills were sent, and the fact that Mr. Ruben did not see the bills does not preclude the possibility that they were received at his agency.

Issue No. 4: Distortion of Newscasts

44. As noted at paragraph 17, supra, Mr. Mercer also asserts that the Burden-Hartke agreement included an obligation on Burden's part to give Senator Hartke publicity on each newscast. Mercer claims to have learned about the arrangement during a conversation with Burden.[19] He contends that he was told "to make sure that Senator Hartke was in every newscast favorably mentioned, and to pass on these instructions to Bill Donnella, then News Director of WIFE."

45. The recollection of all concerned is very hazy on this subject, but there can be little doubt that Mercer gave some such orders to Donnella. Although Donnella disclaims any memory of just how Mercer worded the instruction, he is quite certain that Mercer told him that Hartke must receive mention on every newscast, and that he passed those orders on to his subordinates.

46. Similarly, the air men working for the station at the time are vague as to just how they were ordered to keep Senator Hartke's name before their listeners. Indeed, their memories are somewhat contradictory as to exactly what happened.[20] However, there is broad agreement that they were under orders to make sure that Senator Hartke received frequent mention in the station's news broadcasts.

47. The record is not clear as to exactly how long Mercer's instructions remained in effect. However, the time was relatively brief, between two days and three weeks. Nor does the record disclose any specific effect of the policy. No one can pinpoint any mention of Senator Hartke that would not have been broadcast absent Mercer's orders, and there is no suggestion that the Senator's opponent received less or different coverage than would have been the case if the staff had been given no instructions whatsoever as to how to cover the campaign.

48. No one other than Mercer purports to know that the order to mention Senator Hartke on every newscast originated with Burden. However, unlike the evidence regarding the spot announcements there is a specific indicator pointing toward Burden.

49. Mr. Donnella recalled that while the instructions regarding the Hartke campaign were in effect, WIFE was visited by Steve Brown, Star's National Program Director. Donnella complained to Brown, as he had previously complained to Mercer, that the policy was inherently unfair to Senator Hartke's opponent. Brown's response was that it was unnecessary to have lengthy items on the Senator, brief mentions would suffice. This conversation attains significance because this record as a whole, as well as the record in *Belk Broadcasting Co. of Florida, Inc.* (see paragraph 2, *supra*), establishes that Brown was one of Burden's principal lieutenants in no way subordinate to Mercer in Star's chain of command. When Brown spoke Star's personnel understood it was with Burden's voice.

50. Mr. Brown denies that such a conversation took place. He acknowledges that he visited Indianapolis during the Hartke campaign and that he talked to Donnella. However, his recollection is that

[19] The record does not specify the date of the conversation, but apparently it was the one at which Mercer claims Burden told him to set up the free spots for Senator Hartke, sometime prior to September 21, 1964.

[20] One thought he recalled a memo being posted on the subject, although no one else recalled any written instructions.

he criticized Donnella for failing to cut individual news stories short enough to permit adherence to the company policy of carrying the maximum number of news items in each newscast. He asserts that he instructed Donnella in his meaning by taking that morning's news script and rewriting several stories editing out unessential portions.[21]

51. It is found that Donnella's memory is inherently more credible. As professional newsmen, he and his subordinates must have chafed under what they could only regard as orders to perform their duties in an unprofessional manner. It is wholly natural that he would have complained to Mercer, and, when that proved fruitless, avail himself of the opportunity created by Brown's presence to carry that complaint higher. Indeed, it would only have been surprising if he failed to do so.

52. Brown's failure to act on the complaint gives rise to certain inferences. He could not have failed to recognize that what Donnella complained of was highly irregular. His refusal to take immediate corrective action may well be attributable to a realization that Mercer was acting within the scope of instructions received from higher authority, and no one at Star possessed such authority other than Burden. In any event, it is found that the record establishes by credible testimony that Mercer's instructions to the news staff were contemporaneously known in Star's higher chain of command, and that immediate action to countermand those instructions was not taken.

Issue No. 5: Political Broadcast Reports

53. On December 4, 1964, WIFE, over Burden's signature, filed with the Commission its completed questionnaire "A survey of Political Broadcasting In the Primary and General Election Campaign of 1964". It asserted by check mark answers to multiple choice questions that: (1) it did not make political time available without charge; and (2) it had "no specific policy" as to making time available without charge.[22] It reported that it had broadcast a total of 768 paid announcements on behalf of Democratic candidates in the general election, for a total charge of $15.880. Possibly, even probably, the totals include the Hartke spots and the charge attributed to them, since they were then being carried as a receivable on the station's books. However, the record is silent on the point.

54. The report also asserted that political rates did not differ from commercial rates, and that candidates for the U.S. Senate were charged local rates.

Issue No. 6: Lack of Candor

55. This issue is to be resolved on the basis of the findings of fact relating to Issues 1 through 5, and requires no separate findings.

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[21] Although Brown was not asked to identify any specific story he edited, the implication is that one of them might have concerned Senator Hartke. If this were so, it would partially reconcile Brown's version with Donnella's, and suggest that what Donnella took for an affirmance of Mercer's instructions re Hartke was actually only the random selection of a news story as an example of editing technique.

[22] The seemingly inconsistent answers cannot be blamed on the licensee. A question on the Commission's form which inquired as to "whether it is your policy to make time available without charge?" contained no accurate response for a station which, like WIFE, did not give free political time. The least inaccurate answer which might be checked was "no specific policy" which WIFE, in fact, did check.

Issues No. 7 and 8: The Oregon Senatorial Campaign

56. On September 22, 1966 a meeting was held in the offices of KISN. Present were Don Burden; Steve Shepard, then Manager of the station; Duane Coker, KISN News Director; Paul Barr, KISN Program Director; Lenny Wynia a/k/a Don Kennedy, KISN disc jockey; and Paul E. Brown a/k/a Paul Oscar Anderson, KISN disc jockey. The meeting was for the purpose of discussing KISN's coverage of the upcoming Oregon [23] campaign for United States Senator between Mark Hatfield and Robert Duncan.

57. Burden announced that Kennedy was relieved of his normal duties and assigned to accompany Governor Hatfield on his campaign. He was to phone in stories on the campaign several times each day.[24] Anderson was to cover Kennedy's air shift as well as his own. While the entire group was assembled no mention was made of coverage of the Duncan campaign.

58. Barr, Kennedy and Anderson then left the meeting; Burden, Shepard and Coker remaining. Burden and Shepard told Coker that he was assigned to cover Congressman Duncan in a manner similar to Kennedy's coverage of Governor Hatfield. The three discussed the fact that the Duncan coverage could not begin immediately because the Congressman was then spending most of his time in Washington, returning to Oregon to campaign only on weekends. However, the record does not clarify whether they then knew or had reason to believe just how long Congressman Duncan would remain in Washington, or when he intended to commence full-time campaigning in Oregon.

59. Pursuant to Burden's instructions Kennedy, Barr, Coker, and Anita Pope, KISN Copy Director, immediately undertook the preparation of on-the-air promotional announcements publicizing the station's intention to cover the Hatfield campaign. No similar announcements were prepared promoting the coverage of the Duncan campaign.[25] In all over 100 promotions for the Hatfield coverage were broadcast over the station commencing on the night of September 22, 1966, and continuing through September 28. Shepard ordered them off the air when he calculated that they had had sufficient exposure to do their job of publicizing the station's programming objectives.

60. The foregoing is essentially uncontroverted, but certain of witnesses offered further testimony designed to show that it was actually Burden's intent to knowingly favor Governor Hatfield's campaign. Mr. Anderson asserted that Burden announced at the September 22 meeting that his purpose was "to put Marc Hatfield in the U.S. Senate", and, to that end only positive news items regarding Hatfield

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[23] KISN is assigned to Vancouver, Washington. That city lies directly across the Columbia River from the much larger city of Portland, Oregon.

[24] There is some disagreement among the witness as to just how many stories Kennedy was to supply each day. However, the record is clear that his coverage to be very extensive.

[25] Coker testified that this was because Duncan's plans to campaign in Oregon were not fixed, hence he could not know just what activities he would be covering. This explanation is unconvincing in view of the fact that the Hatfield promotions were not specific either, mentioning only that the Hatfield campaign was to be extensively covered. Indeed, if the Hatfield promotions had been modified only by substituting Duncan's name, they would have accurately presented what Star contends was its plan for covering the Duncan campaign.

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and only negative stories concerning Duncan were to be carried. Anderson also denied that Coker had remained with Burden and Shepard after the others left the meeting. Furthermore, he testified to two informal meetings with Coker shortly after Burden's September 22 conference at which Coker was concerned that the planned coverage of the Hatfield campaign was unfair to Duncan and possibly illegal. Anderson first conveyed this story to the Commission in a letter received on September 28, 1966.

61. However, contemporary events cast doubt on Anderson's story by revealing that he was motivated, at least in part, by self-interest. Anderson was under contract to KISN as an air personality at $215 per week. His contract prohibited him from working for a rival station in the Portland area within one year of such time as he might leave KISN. Anderson asserts that when he heard Burden's plan he regarded it as wrong and resolved not to be a party to it. However, he did not complain to Burden, Shepard or any other of his superiors. Instead, on September 24 he met with the owner of a competing station to discuss the possibility of employment.

62. He next reported for work at 5:00 a.m. on September 26, but he declined to air the Hatfield campaign coverage promotions. At around 8:45 a.m. KISN's Program Director, Buzz Barr, inquired of him why he was not broadcasting the promotions. Anderson then expressed his misgivings to Barr, and asked to speak to Shepard. Barr responded that if Shepard or Burden discovered that he had not run the promotions Anderson would be out of a job. Anderson construed this as meaning that he was fired, and he left the station immediately. Shortly thereafter he went to work for the rival station as an air personality plus supervisor of programming at $600 per month plus a percentage of the station's gross.

63. Thus, the upshot of the controversy was that Anderson bettered himself professionally, although he would have been prevented from doing so by his contract had not events transpired to render that contract null and void.[26] Under such circumstances, his testimony must be suspect absent corroboration.

64. Such corroboration is lacking. No one other than Anderson recalls Burden saying that the Hatfield coverage was to be positive and the Duncan coverage negative.[27] No example is given of any adverse story carried regarding Congressman Duncan's campaign. The record is barren of any support for Anderson's story other than the circumstances that in the days immediately following Burden's September 22nd conference his plan did result in extensive coverage

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[26] In fact, Anderson's advancement in the industry was short-lived. KISN sought and obtained a restraining order from a local court which prevented Anderson's continuing on the air for the competing station.

[27] One witness, then employed in the KISN traffic department, testified that at or about this time she attended a social get-together at which Coker was present and that "Coker was under the impression nothing should be said about Duncan unless it was derogatory". However, her recollection was very dim, and she was unable to state what, if anything, Coker said had led him to this impression. Under such circumstances there is no basis for inferring that Coker's remarks at the time were inspired by something that Burden said. Indeed, Coker's own recollection of these talks is that such remarks were made by others, and he said nothing because he did not wish to inform the staff that he would later be off shift in order to cover Duncan. He feared that if people knew someone was going to have to cover his air time they would commence to fabricate excuses in order to avoid the extra duty.

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of Governor Hatfield's campaign and very little of Congressman Duncan's.[28]

65. Kennedy commenced his coverage of Governor Hatfield on September 24, 1966. He rode with Hatfield and his driver on a swing through eastern Oregon, and accompanied him to every function. Approximately three times a day he would phone in stories covering all of Governor Hatfield's campaign activities, usually including actualities of Hatfield's voice. This coverage continued through October 3, 1966. While records of the station's programming are now incomplete, it appears that Kennedy's Hatfield stories were aired some 65–75 times on the 200 odd KISN newscasts carried during this period.

66. During most of this period Congressman Duncan remained in Washington, returning to Oregon to campaign on weekends. The record reveals only three appearances in Oregon by him during this period, and Coker covered them all. Duncan's campaign received 43 mentions on KISN newscasts during the period September 24–October 3.

67. On October 3, 1966, Anderson's charges to the FCC were made public in Oregon. The publicity caused Shepard to cancel Kennedy's coverage of Hatfield because he feared it lent credence to Anderson's story.

68. In the meantime, the disparity of treatment of the two candidates had not escaped public notice. Several people had called Jack Clenaghen, who was handling the advertising for Congressman Duncan's campaign, and directed his attention to the matter. As a result, Clenaghen monitored KISN for some 2½ hours on the afternoon of September 28, and had his secretary monitor the station intermittently on September 29. He concluded that the coverage of the two candidates was unequal contrary to his understanding of KISN's intention which had been expressed to him when Shepard called him on September 23 to explain the station's plans. Thereupon, he called Shepard to complain that the station's handling of the campaign was unfair.

69. Burden also discussed his plans for coverage of the campaign with members of another department at KISN. At or about the time of his September 22 meeting with his operational personnel he convened another meeting of his sales staff. However, the recollections of those in attendance as to just what transpired are too vague and conflicting to permit the formulation of any firm findings of fact.

70. One salesman recalls Burden telling of plans to cover both the Hatfield and Duncan campaigns; another remembers only the Hatfield campaign being discussed. One asserted that they were told that the news department would carry only favorable Hatfield and unfavorable Duncan stories, but no one else who was there shares that memory. There is general agreement that a question was raised as to whether Duncan's more frequent absences from Oregon might create problems under the fairness doctrine, but there is no consensus as to

[28] The record makes clear that Burden was an admirer of Governor Hatfield, and that he personally supported the Governor's candidacy for the U.S. Senate. This was common knowledge with the KISN staff.

whether Burden's answers treated this as a problem susceptible of solution or as the basis for a subterfuge by which the station could favor Governor Hatfield. Each of the salesmen who testified presented the demeanor of a witness giving his best recollection of a long past, dimly remembered incident. Absent an arbitrary preference of one man's story over the others,[29] the testimony relating to this meeting provides no firm foundation for any decisionally significant finding of fact.

Issue No. 9: Corporate Contribution to Hatfield

71. Mrs. Dorothy Storz, then bookkeeper of Star Stations, Inc., testified that in May of 1966, Burden told her to draw a check on Star Stations, Inc. in the sum of $1,000 payable to cash. She was ordered to cash it for ten $100 bills. She asserted that on Burden's instruction the money was placed in an envelope unaccompanied by any message and mailed to Governor Hatfield's office in Salem, Oregon. Mrs. Storz retained in her own personal files[30] a postal return receipt for the letter signed by Mrs. Evalyn Cook, then secretary to Governor Hatfield's Executive Assistant.

72. As bookkeeper Mrs. Storz posted the $1,000 item on May 18, 1966 to a "suspense account".[31] It was thereafter posted as a "political contribution non-deductible". Finally, on October 26, 1966, the posting was changed to "Don W. Burden Contributions to correct posting on Ck. #3133 dated May 18, 1966". The ultimate posting was made by a subordinate of Mrs. Storz who did so on Mrs. Storz instructions. This individual stated that Mrs. Storz told her that she was following Burden's orders.[32]

73. Don Burden denies knowledge of the whole thing. Senator Hatfield denies, on his own recollection and on the recollection of staff members with whom he checked, ever receiving any contribution from Star or Burden, or ever receiving any envelope containing $1,000 in cash from an anonymous donor. Mrs. Cook concedes that she sometimes signed for registered mail. However, she denies ever having opened any envelope containing $1,000 in cash, or ever having heard of such an envelope being received. The official campaign financial reports for Senator Hatfield's 1966 campaign show no contribution from Star or Burden or any anonymous contribution which might be the one described by Mrs. Storz.

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[29] If a finding were to be made as to specifically what transpired at the meeting, logic would not favor that version of events derogatory to Star. Plainly, the only reason for convening the sales staff was to advise them of new programming which might attract or interest a segment of the listening audience. There would be no reason to tell them that such programming was part of a plot of which some of them or their customers would inevitably disapprove. It would seem more likely that the memories of those who testified as to Burden's confession of planned impropriety were colored by the contemporaneous publicity given to Anderson's charges relating to campaign coverage. All of this, however, is, of course, sheer speculation.

[30] As hereinafter noted a simple postal return receipt is useless in proving the contents of the envelope received. However, the fact that Mrs. Storz removed such a document from the office files and retained it in a personal file indicates that her attitude toward her employer was tempered by other than routine considerations.

[31] A posting used by a bookkeeper who does not know exactly what the item should be charged to.

[32] The final posting of the $1,000 item followed by two days the receipt by Star from its Washington counsel of a copy of 18 USC 610, which prohibits, *inter alia* corporate contributions to senatorial campaigns. The copy of the statute was accompanied by counsel's note reading: "Don: This is what I had in mind". Burden testified that this communication from counsel resulted from his inquiry as to whether he might make corporate contributions to both Hatfield and Duncan.

74. In short there is not a shred of evidence that the $1,000 was received on behalf of Senator Hatfield, and no evidence other than Mrs. Storz testimony that it was sent. Nor does the documentation support Mrs. Storz story other than to the extent that it is not inconsistent with it. The $1,000 check to cash was drawn and negotiated by Mrs. Storz herself, and the entries in Star's books were made either by herself or at her direction. The postal return receipt shows that someone at Star sent something to Governor Hatfield's office, but the receipt alone sheds no light on who sent what. There is simply nothing to back up Mrs. Storz inherently bizarre tale regarding the dispatch of a sizeable sum of cash unaccompanied by any identifying communication.

75. This is not to say that no suspicions are raised. The final reposting of the books two days after receiving advice from counsel that corporate political contributions may be unlawful is too great a coincidence to be blinked. Nevertheless, suspicion that some hanky-panky occurred in connection with the $1,000 withdrawal of May 18, 1966 is not tantamount to suspicion, much less proof, that 18 USC 610 was violated. The possibilities of what may have been done, and who may have done it, are too numerous to warrant any finding responsive to the inquiry directed to Issue No. 9.

Issue No. 10: Lack of Candor

76. This issue is to be resolved on the basis of the findings of fact relating to Issues 7 through 9, and requires no separate findings.

Issue No. 11: KISN Zoning

77. In the fall of 1964 KISN undertook to move its transmitter site. By early 1966 it had secured the necessary consent from the FAA and the FCC, and the only barrier remaining was zoning authorization from Multnomah County. This approval was not forthcoming, and Burden became impatient.

78. He formed the opinion that matters might be expedited if he were to make a "political contribution" to the members of the zoning authority.[33] On the basis thereof he telephoned the stockholders of Star and secured the consent of each to the making of a joint "personal" contribution, each to supply that percentage of the contribution which was equal to his percentage of ownership in Star. The actual money was to come from Star itself, and to be disbursed as a special dividend to the stockholders.

79. Accordingly, in March of 1966 Burden, who was then in Portland, directed Mrs. Storz to draw $10,000 on Star's account in Omaha and send it to him in cash. She complied with these instructions on March 10, 1966. However, later that month before Burden did anything with the money, zoning approval was granted by the authorities. Thereafter, Burden distributed the $10,000 to the Star stockholders as

[33] Burden asserts that he was influenced in his decision to make a "political contribution" by rumors he heard around Portland to the effect that such contributions tended to expedite or influence zoning decisions. He claimed those rumors emanated from many sources, but he was able to identify only one. That individual testified that, in fact, he had no knowledge of such matters and that he had never advised Burden to so proceed. However, he acknowledged that he might have made some remark in jest which Burden could have construed as a suggestion.

a special dividend in amounts commensurate with their ownership interests in the corporation.

80. The record does not indicate the individuals or organizations to whom Burden intended to contribute the $10,000, or even that he had reached a decision as to such matters. Hence, there is no basis for any finding as to whether his intended contribution would have complied with the applicable regulations.

81. On February 24, 1966, the date on which the Multnomah County Commission held a public hearing in connection with KISN's zoning application, KISN drew a check in the sum of $2,000 payable to one Del Easley, a Portland real estate broker. The check was never delivered to Easley, and was voided on the station's books on March 16, 1966.

82. The record does not disclose who authorized the check or who signed it, and there is nothing but speculation as to what it might have been intended to purchase. Mr. Shepard has a vague recollection that it might have been intended as a holding deposit on a piece of land which the station was then interested in acquiring. Easley himself knew nothing about the check, although he did recall discussing with someone from KISN the possibility of a land purchase. The record contains not a shred of evidence to link the $2,000 check with the contemporaneously pending zoning application. Mrs. Storz testified that Burden told her that Shepard had taken the check to Easley, but "that the man didn't want a check". However, Mrs. Storz did not claim to know why the check had been issued or why Easley did not want it.

Issue No. 12: Lack of Candor

83. Mr. Burden has testified on several occasions regarding the matters relating to Issue No. 11. His testimony has been consistent overall. Such minor discrepancies as exist are more likely attributable to the fact that he was giving answers to slightly different questions on the same subjects asked months or years apart rather than to any deliberate intention to deceive. As to certain details he claims failure of recollection, and the record contains no evidence casting doubt on that claim.

Issue No. 13: Hooper Gifts

84. C. E. Hooper, Inc. operates a rating service for broadcast stations. Mr. Frank Stisser was employed by Hooper for some 20 years, serving as President of the company from 1957 to 1971. Stisser has known Don Burden since 1954, and the two regard themselves as close personal friends. Their families are friends, they visit each other's homes, and they have vacationed together. Since 1954 the Star stations have been off and on subscribers to the Hooper rating service.

85. In September, 1965, Burden gave Stisser a yard tractor valued at $444.20 which Star had obtained on a trade-out. On two occasions, once in June, 1966 and once approximately a year earlier, Stisser and his party stayed at a Las Vegas hotel and charged their expenses to Star's "due bill" [34] at the establishment. On the 1966 visit the charges

[34] It is a fairly common practice in the broadcast industry for resorts to pay for their advertising by giving "due bills" good for accommodations and services. These "due bills" may be used by station employees, awarded as prizes, used by the stations in lieu of cash to pay certain of their own bills, or simply given away.

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totaled $147.95, but the record does not indicate how much was charged on the earlier trip.

86. Both Stisser and Burden regarded these gifts as tokens of personal esteem unrelated to Stisser's connection with Hooper. Each was aware they cost nothing out of pocket to either Star or Burden. Both contend that neither Burden nor Star ever sought or received any sort of special treatment from Hooper, and the record contains no evidence to the contrary.

Issue No. 14: Telephone Calls of Government Witnesses

87. The hearing noted at paragraph 10, *supra*, was conducted in Indianapolis, Indiana in November 1966. At that time Mrs. Storz was still on the Star team, and was the confident of Star's management. She asserts that Steve Brown told her that Star had made arrangements to monitor the telephone calls of the Broadcast Bureau's witnesses. She does not purport to now just what arrangements were made, and her only knowledge derives from a brief conversation with Brown at a time when he was under the influence of alcohol.

88. Burden acknowledges a conversation with a hotel switchboard operator. He states that he inquired whether Louise Rudol, a former Star employee then appearing as a Bureau witness, had made any telephone calls. The operator replied that Miss Rudol had made one call to Omaha, Nebraska. Burden contends that he made the inquiry because he was concerned that Miss Rudol and Ron Mercer might concoct testimony adverse to Star and he wished to know if they had been in contact. He denies that any call was monitored.

89. Star produced all of the persons who were employed as switchboard operators at the hotel in November, 1966. Each denied having monitored any call or having been asked to do so. In fact, the nature of the telephone equipment at the hotel was such that it would have been impossible for the operator to monitor telephone conversations.

Issue No. 15: Fire Insurance Claims

90. On June 4, 1965, a fire occurred in the Omaha office building where Star maintained its offices. At the time Star had stored in the basement of the building certain items it had obtained through trade-outs for use as prizes in its promotions. These included certain cameras.

91. On the night of June 4 Burden returned to the building. He found the prize material had been removed from the building and piled up outside. He inspected it and found it to have been damaged by fire and water. Accordingly, he gave permission to the by-standers to take what they wanted. However, he put some 10 or 11 cameras in the trunk of his car and took them to his garage. Subsequently he determined that they had been ruined and threw them away.

92. On June 5 Burden left Omaha on a trip to the west coast. During his absence his secretary, Louise Rudol, was contacted by agents from the police and the insurance adjusters inquiring as to the specifics of the property Star had lost. They were concerned because their investigation of the debris did not uncover any cameras.[35] Miss Rudol

[35] It is unclear why the investigators were interested in cameras at this time. Apparently no report of loss or insurance claim had yet been filed, and the record does not disclose how they would have known about the cameras.

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gave them a general description of the property, but was unable to supply any specifics.[36] When she told Burden about the investigation he instructed her to write to Dunnan and Jeffrey, Inc., from which the cameras had been obtained, to secure a list of the serial numbers.

93. On August 30, 1965, Dunnan and Jeffrey replied. With respect to what was done with that letter the record is in a state of confusion. Miss Rudol asserts that it was on two pages: one a short note expressing regrets as to the fire; and the other containing a list of serial numbers. She contends that the list of serial numbers was broken down to show that certain cameras had been shipped by Dunnan and Jeffrey to Star in Omaha, others had been shipped to WIFE in Indianapolis; and others to KISN in Portland.[37]

94. Miss Rudol testified that when she showed the Dunnan and Jeffrey letter to Burden he stated that the information could not be passed on to the insurance investigators in that form. Hence, she testified, "he cut it up, cut it up and fixed it up and took the portion of the letter and cut off the shipping instructions off the other one and pasted the serial numbers just to the bottom of their letter, and that's what was sent in". She asserts that the doctored letter was then zeroxed in two copies, one of which was sent to the insurance adjusters and one retained in the station files.[38]

95. Mr. Burden denies that the incident of the doctored letter ever occurred. He asserts that he was not privy to the correspondence when it was transmitted, and that Miss Rudol handled the matter entirely on her own.

96. The weight of the evidence disfavors Miss Rudol's version of events. First, nothing is offered in support of her story, although it could have been conclusively proven one way or the other by introducing the appropriate documents from the files of Dunnan and Jeffrey and the insurance adjusters. More importantly, the invoice and inventory note in Miss Rudol's own handwriting discussed at footnote 36, supra, indicate that, in fact, all of the cameras were shipped by Dunnan and Jeffrey directly to Omaha, and that some were later shipped by Star itself to Indianapolis and Portland.

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[36] However, on July 6, 1965, Miss Rudol wrote to the Omaha Fire Department giving a list of the items lost. That list included 29 Bolex cameras at $314 and 43 Bolex cameras at $413.50. The record does not clarify what records she consulted to obtain this information. However, it appears likely that she derived the figures by consulting a May 13, 1964 Dunnan and Jeffrey invoice showing that Star had received 40 Bolex cameras at $314 and 60 Bolex cameras at $413.50, together with an undated inventory note in her own handwriting in Star's files indicating that on June 30, 1964, 17 of the $413.50 cameras were sent to WIFE and on December 23, 1964, 11 of the $314 cameras were sent to KISN.

[37] This, of course, is directly contrary to the invoice and note in Miss Rudol's handwriting noted at footnote 36, *supra*, since they indicate that all 100 cameras were shipped by Dunnan and Jeffrey directly to Star at Omaha, and that Star later shipped some of them to Indianapolis and Portland. Miss Rudol was not asked to explain this discrepancy.

[38] The physical evidence relating to this portion of Miss Rudol's testimony is confusing but does not tend to support her version of what transpired. Star's files contained zeroxed copies of two letters. One, supposedly the doctored copy although it was never properly identified as such, states in pertinent part, "listed below are the serial numbers for the cameras". This letter is on the letterhead of Dunnan and Jeffrey, Incorporated, and bears the typed and handwritten signature of one Mary Ellen Clark. The other, which is wholly unidentified, contains the same serial numbers and the same text except that in pertinent part it reads, "listed below are the serial numbers for the cameras shipped to both Portland, Oregon and Omaha, Nebraska". This letter is not on the letterhead of Dunnan and Jeffrey, and, although it bears the typewritten signature of Mary Ellen Clark, it has no handwritten signature. The matter would, of course, have been clarified if the record contained Dunnan and Jeffrey's copy of the letter they sent to Star and the insurance adjuster's copy of the letter they received from Star. However, neither of these letters was offered.

97. In due time [39] Star filed a loss claim under its insurance policy. It included a claim for 72 cameras. On June 18, 1966 a modified claim was offered reducing the claimed camera loss to 54. Apparently, although the record is less than clear, the reduction resulted from negotiations between Burden and someone from the insurance company during which the carrier protested liability for the cameras which Burden removed on the night of the fire. However, there is nothing in the record to indicate that Burden ever attempted to conceal the fact that he had removed some of the cameras,[40] or to contradict his claim that their condition was such as to make them unuseable as prizes. The modified loss claim in the sum of $22,531.90 was settled for $4,213.90.[41]

98. In sum, there is nothing in this record to indicate that Burden or Star ever attempted to defraud the insurance company, or that any material fact was ever deliberately concealed from anyone.

Issue No. 16: Rule 1.613(c)

99. For some 14 years the Omaha Food Retailers Association has sponsored the "Grocery Boy" program on Station KOIL. The program is aired from 11:00 to 11:15 a.m. Mondays through Fridays. For the period January 1, 1965 to April 30, 1970 the contract between the parties called for the Association to pay KOIL $21.00 per program. Beginning May 1, 1970 the rate was raised to $25.00.

100. The Association is composed of between 125 and 150 Omaha grocery stores and certain grocery supply firms. The contract between KOIL and the Association permits the Association to sell up to four 1-minute commercials on each program. The Association, in fact, has been selling these commercials to grocery suppliers at the rate of $25.00 per spot. These advertisers are not required to be members of the Association, although, in practice, nearly all of them are.

101. The contracts between the station and the Association were not filed with the Commission until April 27, 1970. At that time both the contract ending on April 30, 1970 and the one commencing the next day were filed.

Issue No. 17: Contests

102. The Star stations have always been heavy users of contests for promotional purposes. Although somewhat fewer contests are carried now than in the past, each station presently uses some 50 to 70 annual contests involving prizes of more than nominal value plus approximately 100 smaller promotions. The Commission's September 1969 renewal of the WIFE license required that the applicant file with its next renewal application a comprehensive report as to its controls over the conduct of contests.

[39] The record does not disclose the date on which the claim was filed. Star's files did not contain a copy of the original claim, and the records of the insurance company or its adjuster were not offered.

[40] As early as October 1, 1965, he acknowledged to an Omaha police officer that he had taken some of the cameras. There is no evidence that he ever denied that fact to anyone.

[41] The record does not contain either the details of the negotiations or a copy of the insurance policy. However, it does disclose that the face of the policy was $10,000 and the value of the property insured was $66,054.20. Official notice is taken that fire insurance policies commonly contain a clause limiting recovery to that percentage of the face value which is equal to the ratio between the amount of the loss and the total value of the property insured.

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103. Since 1969 Star has cleared with counsel all contests involving prizes of substantial value. While Mr. Burden sometimes participates in the development of contest concepts, the primary responsibility for actually setting them up has rested with Steve Brown and the station managers. Since April, 1968 Brown has required that the details of all contests must be cleared with him. Program Directors must go over the rules for each contest with all station personnel involved, and the rules of each contest must be read verbatim over the air during morning and evening drive time every day while a contest is running. In May of 1968 Star's lawyer wrote a letter explaining 47 USC 509, which forbids the rigging of contests. Every employee involved in contests is required to read and sign a copy of that letter.

104. The record contains evidence relating to five of the several hundred contests presented by Star over the past few years. One was the "Grocery Boy" content presented over KOIL in the course of the program discussed at paragraphs 99–101, *supra*. The contest involves the broadcast each day of the name of one of the grocer members of the Association. A member of the public is then called and if he can identify the named grocer he receives a gift certificate redeemable at any member grocery store. The certificate is initially $10, increasing $10 a day until a winner is found. The numbers to be called are selected by the advertising agency handling the account. The selection is random, weighted to insure that the persons called will be evenly distributed throughout the various Omaha telephone exchanges. Although no attempt is made to exclude Star employees or those connected with the agency, the record does not indicate that any such person has ever been called. Indeed, there is no evidence that anyone was ever deceived by or complained of the contest.

105. "The 13 Car Sweepstakes" was broadcast as a separate contest over each of the Star stations in April, 1966. The rules contemplated the broadcast of a key word which was changed every hour. People were selected at random from the telephone book and asked to identify the key word. If they succeeded their names were entered in a random drawing which, at the conclusion of the contest, determined the winner. The controversy regarding this contest stems not from its conduct but from its promotion.

106. The contest was modeled on one carried by a non-associated Los Angeles radio station. The concept of the contest was discussed at a Star management conference in Chicago to which Steve Brown brought tapes of the proposed promotional announcements. Some discussion arose as to whether the name of the contest and the context of the promotional announcements might not create the impression that 13 cars, rather than one to be selected from a list of 13 different models, were to be given away.[42] As a result, Brown's proposed promos were redone, and instructions were given to the program directors present that care should be taken to make the prize clear to their listening

[42] The then program director of KISN testified that it was his "opinion" to which he could "only speculate" that Burden hoped that the promotional announcements would mislead the public as to the number of cars to be given away. His opinion was based on the inference he drew from what he remembered as Burden's ambiguous response to a query on the subject.

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audience. The following are samples of the promotional announcements actually run:

> Today is the final day to qualify in the drawing for one of the cars of your choice among the 13 most wanted automobiles in America.
>
> You must qualify today between the hours of 7 and 7 to be entered in the drawing for one of the 13 most wanted cars in America.
>
> The winner's name will be announced during the drawing at Lloyd Center April 30th at 12 noon. You could be the winner of KISN's 13 Car Sweepstakes.
>
> The 13 most wanted cars will be lined up at Lloyd Center and the person with the right golden key drawn at 12 noon on April 30 will win the car of their choice.
>
> Remember the secret word changes every hour. Listen for the KISN sweethearts to call you. Give the correct word and become a finalist in KISN's 13 car sweepstakes.
>
> You may win a brand new car. Know the hourly secret word on KISN and give that word to the KISN sweetheart when she calls.
>
> I'm sorry Mrs. _____ (if no winner) but tune KISN at 91 on your radio dial. We will definitely be making repeat calls, and we will probably call you again to qualify to win one of our 13 exciting automobiles.

107. In the event, it appears that some confusion did arise as to whether one or thirteen cars were to be awarded. On April 15, 1966, the General Manager of the Omaha Better Business Bureau wrote a letter to Burden suggesting that the promos would be clearer if they stated that the winner would receive "his" rather than "their" choice of the 13 cars. Burden ordered the modification to be made. No complaints were received in Indianapolis or Portland. However, after the award ceremony in Indianapolis, a few people inquired when the other 12 cars were to be given away.

108. In April of 1968 a "Mystery Melody" contest on WIFE was rigged. The contest rules contemplated calls to persons selected at random from the telephone book. If that person could identify the mystery melody he was awarded $1,000. On the morning of April 10, 1968 Kiley's secretary heard that there was a winner. In accordance with her regular duties she checked the list of names to be called, but was unable to find that of the winner. Investigation revealed that the winner's wife had phoned WIFE, stated that she had an unlisted number but knew the name of the mystery melody and asked to be called. Contrary to the rules and her instructions the contest operator called the number. As a result of this incident the contest operator was fired, the supposed winner was not paid, but $2,000 was donated to charity instead. No complaint was made to the Commission relative to this matter, the Commission having become aware of it through the licensee's prompt, voluntary report.

109. In May of 1968 "KOIL's Big Black Box" contest was rigged. The contest involved telephone calls to listeners who had sent in post card entries. The listeners were required to correctly identify three items in the "big black box". A winner emerged at a time when the station's executives did not believe it likely that sufficient clues had been given to make a correct guess possible. Their investigation disclosed that a station salesman had improperly acquired knowledge as to the contents of the box, and connived with a friend for the friend's daughter to enter and win. The salesman was discharged, and the "winner" was not awarded her prize. Here again, no complaint was

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made to the Commission relative to this matter, the Commission having become aware of it through the licensee's prompt, voluntary report.

110. The Camporama Contest was a sort of cooperative enterprise whereby KISN and a Portland automobile dealer undertook to advertise the dealer's line of camper trucks. The contest involved locking a KISN air personality in a camper from which he, from time to time, broadcast. The public was invited to come to the dealer's showroom and select from a bowl full of keys. The one who selected the key that opened the broadcast camper won the vehicle. The control of the keys remained in the hands of the automobile dealer. There is no evidence of any impropriety in connection with the contest.

Issue 18: Trade-Out Accounting

111. Since prior to 1964 national trade-out records for all of the Star stations have been kept at the corporate home office in Omaha. A variety of reasons dictated this practice. Essentially, they involved central control over how much national trade-out business would be accepted, and the additional leverage that a multi-station chain could exert in negotiations with an advertiser seeking a trade-out deal. Income derived from the trade-out agreements is, of course, taxable, and is included in the station's tax computations. However, it is also of interest to the music licensing firms of ASCAP and BMI in computing the license fees owed by the stations. These firms conduct their own audits of the station's books followed by negotiation as to the fee due. Such negotiations are necessary because trade-out deals are rarely based on a one-to-one market value of product to market value of air-time ratio.

112. Mrs. Storz, who kept the Star's books from 1961 to sometime in 1964 was of the opinion that the central bookkeeping on the national trade-outs was for the purpose of denying to ASCAP and BMI their proper fees. She asserted that, pursuant to instructions, she denied ASCAP's auditors access to the station's records on trade-outs.

113. This testimony is difficult to credit absent corroboration. It would be highly unusual for a licensing firm's auditor to simply accept a refusal of access to records which he was plainly entitled to inspect. Especially is this so in the case of a station chain which to any knowledgeable eye must be deeply involved in trade-outs. Thus, the failure to corroborate Mrs. Storz testimony with the testimony of the ASCAP and BMI auditors, or indeed, to offer any evidence showing that the licensing firms were dissatisfied with Star's procedures, leads to the finding that Mrs. Storz recollection on the point is hazy. In any event, the record is barren of any evidence that ASCAP or BMI was ever defrauded by Star Stations.

Issue No. 19: Harassment of Witnesses

114. This issue seeks to explore whether Star has dealt improperly with witnesses or potential witness in its various FCC hearings. Ron Mercer contends that Star and Burden have attempted to ruin his business in retribution for his unfavorable testimony in the 1966 hearing. For example, Mercer claims [43] that he has handled the Simpson

[43] Mercer's contentions will be outlined. However, as noted at paragraphs 23 and 24, *supra*, his claims as to harassment by Burden are not to be received uncritically. His testimony will be credited only when substantially corroborated.

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Stygall account since about 1966. During that time whenever a WIFE saleman has solicited the company for advertising he has been referred to Mercer and has responded to the effect that WIFE does not do business with Mercer. This assertion received corroboration of a sort. Mr. Kiley acknowledged that on one occasion he required Stygall to pay Mercer's commission on an advertising contract directly to Mercer contrary to the usual industry practice. He further acknowledged that his action was, at least in part, inspired by the pendency of the instant hearing and his knowledge that Mercer would participate as a witness hostile to Star.

115. Mercer also claimed that he was told by his client, the President of the First National Bank and Trust of Plainfield, Indiana and by Bud Gates of Gates Chevrolet that Kiley had disparaged him to them. Kiley denied knowing the former, and denied having spoken of Mercer to the latter. Neither witness supposedly having actual knowledge of Kiley's actions was produced, and this record does not justify a finding contrary to Kiley's denial.

116. Mercer also contends that he lost the Y&W Management account because the president of the company, Vern Young, was told by a WIFE employee that WIFE would not recognize Mercer as an agency. Although Young's recollection differs materially from Mercer's, he does supply corroboration in part. Young denies that Mercer's disagreement with WIFE had anything to do with his failure to hire Mercer as an advertising agent,[44] or that he told Mercer that such was the reason for his decision. However, he acknowledges that he had been told he might have trouble placing advertising on WIFE through Mercer, and that he did communicate this fact to Mercer.

117. Mr. Mercer further testified that when he bought time on WIFE on behalf of Danners Five & Ten Cent Store he was made to pay in advance. This, he says, led Danners to conclude that he was not substantial enough to handle their advertising so they cancelled his services. Although no witness from Danners was produced, Star was unable to deny that it required advance payment from Mercer. Moreover, it acknowledged that it did from time to time extend him credit, and his account had not come into arrears. Under these circumstances, a finding is warranted that Mercer was required to pay in advance on the Danners account, and for no demonstrated commercial reason.

118. Mr. Mercer asserted that in about 1970 one of his clients, Bob Corum of Wig Warehouses attended WIFE's annual client party. While there Corum was purportedly told by WIFE personnel that Mercer engaged in dishonest practices, and as a result he dropped Mercer as an advertising agent. Corum was not called, nor was Mercer's story otherwise corroborated.

119. There is little doubt that the hostility of Star and its people toward Mercer is related to the various hearings which have taken place. On December 15, 1965, when Mercer was leaving WIFE, Burden wrote a memo to his top staff indicating that they were not to indicate to anyone why Mercer and Star were parting company or to other-

[44] Mercer and his former associates represented Y&W, and the account was "lost" when Mercer's firm was dissolved. Young was uncertain then whether to retain Mercer, his former associates, or a third party. He finally opted for no advertising agent at all.

wise derogate him. However, after Mercer testified in the 1966 hearing on behalf of the Broadcast Bureau this attitude changed. Burden and Kiley spoke of Mercer in a derogatory fashion to various people.[45] The climate changed to one in which the incidents recounted at paragraphs 114–118 either took place or Mercer believed they took place. In short it can be found that since 1966 Mercer has been saying unkind things about Burden and his associates before various federal entities, and Burden and his associates having been saying unkind things about Mercer before certain of those tribunals and in the community where they reside. However, Star's attacks on Mercer appear to be sporadic displays of rage rather than part of a concentrated organized plan to prevent him from testifying or to retaliate against his adverse testimony. His credit has been sometimes accepted. His clients' advertising has been sometimes run routinely and sometimes handled extraordinarily. There is no pattern, and it cannot be found that Star intended harassment as opposed to reflex, if imprudent, striking out at an opponent.

120. Mercer also claims that prior to the 1966 hearing Steve Brown called upon him, told him that he, Brown, was no longer working for Burden, and invited him to dinner. Over cocktails Brown supposedly told Mercer that unless he testified favorably to Burden Brown's stock interest in Star would be devalued. Hence, Brown asked Mercer "to not create any problems for Star Stations with my testimony". In the course of the conversation Mercer says Brown excused himself. Mercer claims he followed Brown to his hotel room where he eavesdropped a telephone call to Burden wherein Brown told him that everything was going according to plan.

121. Brown denies this whole bizarre tale. He acknowledges having drinks with Mercer, and that the upcoming hearing was discussed. However, he claims that Mercer initiated the talk about stock interests. He further says that he did not make any request of Mercer regarding testimony. There is no corroboration for Mercer's story, and for the reasons heretofore cited his testimony will not be accepted absent corroboration.

122. However, Star has investigated Mercer on occasion. Burden has contacted a former business associate of Mercer's as well as Mercer's ex-wife, each of whom was reputed to be publicly derogating Mr. Mercer. His purpose was to obtain information regarding Mercer, presumably for the purpose of impeachment at the instant hearing.

123. In April of 1966 Louise Rudol resigned as Mr. Burden's secretary. Shortly thereafter it came to Burden's attention that FCC investigators had interviewed Miss Rudol. He had another employee telephone Miss Rudol to see what the investigators had wanted, but she refused to talk about it on the telephone.

124. Burden then arranged to have his employee, Judy Gunson, meet with Miss Rudol for dinner to discuss Miss Rudol's conversations with the Commission's investigators. Electronic recording devices were planted in Mrs. Gunson's car, at the restaurant table where

[45] Both Burden and Kiley claim they spoke only the truth. Since the record is very vague as to just what it was they said, and there is no evidence relating to whatever charges they may have made, there is no basis for evaluating that claim.

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they were to eat, and in Mrs. Gunson's purse.[46] However, although the two women kept their dinner date, everything else went wrong. They didn't go to the wired restaurant, they didn't use the wired car, and Mrs. Gunson didn't bring along the recording equipment in her purse. Apparently, Miss Rudol never knew she was to be recorded, and the record does not disclose whether she ever revealed to Star just what she may have told the Commission's investigators.

125. Miss Rudol also testified that for some two weeks prior to her testimony in the 1966 hearing she was subject to a series of harassing telephone calls. Most were of the anonymous variety where the caller would either hang up or refuse to speak. On other occasions she recognized Burden's or Brown's voice in the background, and at times Burden spoke on the phone using "foul language". Mr. Burden denied being a party to or having any knowledge of such telephone calls, and no corroborating evidence thereof was offered.[47]

126. Before accepting Miss Rudol's story at face value it is found that corroboration would be required. Although she denies hostility toward Burden and Star her actions belie this claim. When she left Star in 1966 she took with her certain business records and personnel documents which she believed tended to incriminate or discredit Burden. She has since given these to various investigators. Such actions are wholly inconsistent with her claimed indifference to Burden's fate, and indicate hostility. Under such circumstances, her unsupported story will not be held to outweigh Burden's denials.

127. In January, 1970, Harl Huebner, a former KISN salesman, gave a statement to Commission investigators regarding his recollection of the incident described at paragraphs 69 and 70, *supra*. About a week later Steve Shepard called him to ask what he had told the investigators. Huebner told him, and Shepard formed the opinion that Huebner had exaggerated his recollection of the incident. Following this conversation Shepard called Jim McGovern, the general manager of Station KYXI, Beaverton, Oregon, where Huebner was then employed. He told McGovern about Huebner's talks with the FCC investigators, and that he wanted McGovern to know what kind of a man Huebner was.

128. Shepard is unable to furnish a convincing reason for this call to McGovern. Plainly, he was angered that Huebner's recollection had been somewhat adverse to Burden, and he deemed the telling of such a story to FCC investigators to be some sort of disloyalty to his former employer. His communication of this feeling to Huebner's present employer, could have had no motive other than to convey this sense of disloyalty in the hope that Huebner would be adversely affected. While McGovern took no action against Huebner, and Shepard did not specifically urge him to do so, it is found that Shepard's intention was to retaliate against Huebner for what he told the Commission's investigators.[48]

[46] The record does not disclose what advantage Star thought it might gain by recording whatever Miss Rudol might say.

[47] Miss Rudol testified that on some of the calls she spoke with the operator at the Essex House in Indianapolis who indicated that Mr. Burden had originated the call. No telephone records from the Essex House were offered nor was any explanation given of their absence. Miss Rudol also testified that she kept a list of times and dates of the calls and gave them to the Broadcast Bureau lawyer who tried the case in 1966. These notes were not offered in either the 1966 hearing or the instant one.

[48] Ironically, Huebner testified in this hearing, but his recollection of the incident which angered Shepard was too imprecise to form the basis of any firm finding.

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129. In December, 1969 FCC investigators presented themselves at WIFE and asked to interview two station employees, J. T. Byers and Bud T. Porter. At the time, by coincidence, a member of the firm of Washington communications counsel which represents Star was present at the station. Kiley summoned both Byers and Porter, told them that they did not have to speak with the FCC investigators without counsel, and offered them the services of Washington counsel. Each elected to speak with counsel before talking to the investigators, and was told by him that he would represent them himself, they could employ counsel of their choice,[49] or they could proceed without counsel. Each chose to be represented by Star's Washington attorney and he appeared for them during the questioning. The record contains not a shred of evidence that Star's interests conflicted in any way with those of Byers or Porter, or that any other legal or ethical barrier stood between Star's Washington lawyer and his representation of Star's employees.

130. Some time in 1969 or 1970 Steve Brown approached Paul E. Barr, who had formerly been program director at KISN and was then employed in a similar capacity at KING, Seattle. Brown offered Barr a job as a part-time consultant for Star Concerts, a subsidiary engaged in promoting live concerts of popular music. The job would have involved obtaining halls, evaluating the popularity of groups and tunes, keeping track of local appearances of groups, price scaling the tickets, handling funds, etc. Barr would be paid $500 per month.

131. Star Concerts has employed individuals to perform similar functions in Minneapolis, Oklahoma City and Louisville. However, since its activities in these cities have involved single concerts, rather than an on going series as planned in Seattle, the employments have not involved payment of a monthly retainer as offered to Barr. The only other instance where the concept of a retainer was explored involved a broadcaster in San Diego, and it does not appear that this individual was actually retained in a consultive capacity.

132. Barr was of the opinion that the retainer of $500 per month was too high for the value of the services he might perform. After consultation with his attorney, he declined the offer. However, the record does not indicate that Brown associated the offer in any way with any testimony that Barr had given or might in the future give.[50]

Issues 20–22: Significance of Foregoing

133. These issues are conclusionary, and require no separate findings of fact.

Issue 25: Meritorious Programing [51]

134. The programming of each of the Star stations is designed to attract the largest possible audience. To that end each is heavily promoted by on-the-air contests, and its musical format is composed of

[49] Neither Kiley on behalf of Star nor the investigators on behalf of the Broadcast Bureau offered to pay the legal fees if either of the two men wished another lawyer of his own choice. In the event, they were not billed for the services of counsel who represented them.

[50] At the time Brown made the job offer Barr's testimony was already a matter of record in the civil action noted at footnote 26, *supra*.

[51] Issue 24, which is concerned with the IBI application, will be treated hereinafter.

tunes most popular with the young adult segment of the population.[72] Because Star believes it has a shifting audience with a relatively short attention span, its nonentertainment programming is characterized by brevity and repetition. By program category their performance has been as follows:

[In percentages]

Category	Renewal period					
	1959-62		1962-65		1965-68	
	KISN	KOIL	KISN	KOIL	KISN	KOIL
1. Entertainment	82.38	83.3	82.13	79.3	.....	.....
2. Religious	.17	.60	1.56	2.0	.....	.....
3. Agricultural	1.46	1.98	2.06	1.83	.....	.....
4. Educational	.10	.30	1.71	1.52	.....	.....
5. News	11.67	12.21	9.18	11.41	12.1	11.43
6. Discussion	.94	.17	.76	.46	.....	.....
7. Talks	3.28	1.42	1.78	.....	.....	.....
8. Public safety	.....	.....	1.04	3.48	.....	.....
9. Public affairs	.....	.....	.....	.....	.99	1.31
10. All other programs exclusive of entertainment and sports	.....	.....	.....	.....	1.83	3.63

The same information for WIFE covers somewhat different periods due to its later acquisition and short-term renewals:

[In percentages]

Category	Renewal period		
	1962-64	1964-65	1965-69
1. Entertainment	18.18	79.81	.....
2. Religious	1.40	2.58	.....
3. Agricultural	0	1.57	.....
4. Educational	.20	1.41	.....
5. News	11.56	10.47	11.43
6. Discussion	0	.32	.....
7. Talks	5.66	3.37	.....
8. Public safety	0	.19	.....
9. Public affairs	.....	.....	1.31
10. All other programs exclusive of entertainment and sports	.....	.....	3.63

135. The following programs have made up Star's public affairs programming:

Program	Began	Ended	Duration	Days per week	Time per day
	KISN				
Editorials	April 1969		90 s	2	16
Let's Talk	1965		90 min	1	1
Community Action Forum	December 1969		60 min	1	1
Under 40 Forum	March 1969	November 1969	15 min	5	1
Family Living	November 1967	December 1968	30 min	1	1
Radio Moscow	March 1962	April 1962	5 min	5	24
Trapper Talk	September 1967	May 1968	15 min	1	1
Vancouver City Council Meetings	1962	1973		(1)	(1)
Citizen Speaks Out	January 1963	1965	2 min	7	4
Washington State Legislative Report	1967	January 1970	60 s	5	6
The Oly Show	January 1967	January 1970	3 min	6	1

[72] The format is not strictly "Top 40". Although much of the music is contemporary, other types of records are intermingled.

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Program	Began	Ended	Duration	Days per week	Times per day
		KOIL			
Editorials	April 1968		90 s	2	16
Community Action Forum	December 1969		60 min	1	1
Under 40 Forum	March 1969	November 1969	15 min	5	1
Family Living	December 1967	December 1968	30 min	1	1
Citizen Speaks Out	January 1963		2 min	5	5
Radio Moscow	March 1962	March 1962	5 min	5	1
Your University Speaks	March 1968		15 min	1	1
A View From the White House.	1965	1965	5 min	1	1
Reports of the Nebraska State Legislature.	1953	1954	15 min	5	1
KOIL Community Calendar	1963	1967	60 s	6	1
		WIFE			
Editorials	April 1968		90 s	2	16
Chuck Boyles Program	November 1969		2 h	5	1
Citizens Speak Out	April 1964		2 min	6	6
Capitol Comments	December 1969		5 min	1	1
Women's View	October 1969		1 min	5	2
Family Living	November 1967	November 1968	30 min	1	1

[1] Scheduled regularly.

In addition the stations have presented special programs from time to time. These have included coverage of significant events, and the occasional dispatch of newsmen to places such as Viet Nam or a political convention.

136. Certain of the foregoing programs may be described as follows: *Chuck Boyles Program* usually featured guests in an open mike format with either listener phone in or studio audience participation. *Citizens Speak Out* was a sort of listener editorial and rebuttal program. *Capitol Comments* was devoted to the functioning of various divisions of the state government. *Women's View* concerned the problems and activities of Indianapolis. *Family Life* was a nationally syndicated program dealing with controversial issues. *Let's Talk* and *Your University Speaks* were presentations from local universities featuring faculty and students. *Community Action Forum* was a panel discussion featuring representatives of various groups discussing local affairs. *Under Forty Forum* was an open mike program on topics of current interest. *Trapper Talk* was a presentation of journalism students from a local high school.

137. The stations have devoted time and resources to both news programming and public service announcements. They are well equipped to handle news stories. They cooperate in the production of the public service announcements they air, as well as setting up public service campaigns for certain organizations not dissimilar to conventional advertising campaigns.

Issues No. 23, 26, and 27: IBI Financial Qualification and Representations With Respect Thereto

138. The order of designation herein noted that IBI would require $567,525 to build its station and operate it for a period of three months.[53] It further noted that this sum was to be raised through

[53] As a proposal to replace an existing station with established revenues, IBI is not required to meet the usual one year financial showing for new applicants.

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$225,000 in capital subscriptions and a $750,000 bank loan. However, it observed that the bank loan commitment was conditioned on the availability of $250,000 in unencumbered capital, $25,000 more than the applicant proposed to raise. Finally, the Commission noted that Jerry L. Kunkel had not shown sufficient assets to contribute $28,000 for the stock he was to receive. The record has revealed that these two problems were in fact a single problem.

139. Around December, 1969, an organizational meeting was held for IBI in Indianapolis. It was generally agreed at this meeting that Kunkel would receive 10% of the stock in the corporation for his efforts in organizing the proposal. On January 16, 1970, the corporation held its first formal board meeting. The Board voted to have the corporation qualify under Section 1244 of the Internal Revenue Code. After the formal meeting the members of the Board informally discussed Kunkel's proposed stock-for-services agreement and apparently for the first time, were advised by counsel that such an agreement might be a barrier to 1244 qualification. Nevertheless, it was the sense of the group that, if it were legally possible, something should be worked out that would result in Kunkel's receiving 10% of the corporate stock in return for his organizational services.

140. This uncertainty as to Kunkel's stock led to the uncertainties in the application which resulted in the designation of the financial issue. Washington communications counsel who drew up the financial portion of the application, was aware that the corporation did not intend to require Kunkel to pay for his stock unless it became legally necessary. Hence, he specified in the application only the $225,000 capital the corporation planned to receive, and did not include any showing as to Kunkel's ability to raise a capital contribution. However, he neglected to include a note as to the stock-for-services plan, leading the Commission to two misapprehensions: that each of the 500 shares of authorized stock was to cost $450 rather than $500; and that Kunkel would be required to raise $28,000 to pay for his proposed 12.5% interest in the corporation.[54]

141. In the meantime, one of the stock subscribers, Jack C. Brinson who is a banker, had approached the Merchants National Bank and Trust Company in connection with the corporate loan. Apparently, he failed to make clear that Kunkel was to receive $25,000 worth of stock for services. Hence, the bank's commitment letter specified that $250,000, rather than $225,000, capital was to be raised as a precondition of the loan.

142. When Washington counsel received the bank's loan letter he realized that IBI was not proposing sufficient paid-in capital to meet the bank's conditions. Nevertheless, he filed the letter with the Commission anyway because he deemed it necessary that the application be filed immediately.[55] However, he did instruct IBI to obtain a new bank loan commitment which would be *prima facie* in accord with the corporation's capitalization plans.

[54] 12.5% of $225,000 capitalization appeared to require Kunkel to raise $28,125.00. Actually he was to receive 10% of $250,000 capitalization free and pay for 2.5%. Thus, he really needed $7,500 to contribute if IBI's plan had worked out.

[55] Although not clarified on the record it is presumed that the need for haste in filing the application was to meet the cut-off date for comparative consideration with the Star renewal application.

143. On January 15, 1971 a new commitment letter was obtained from The Indiana National Bank, again in the sum of $750,000. The loan requires "paid in and unimpaired capital" [56] of $225,000, and is to be guaranteed by nine IBI stockholders.[57] On February 24, 1971 an amendment submitting the new credit letter was accepted.

144. That same amendment also tendered a letter from the American Fletcher National Bank committing itself to lend Mr. Kunkel $28,000 to meet his stock subscription.[58] This document was submitted because the plan to give Kunkel stock for services had not yet been resolved. Until it should be resolved IBI wished to demonstrate financial qualifications both ways: $225,000 in capital plus a bank loan if Kunkel could receive stock for services; $250,000 in capital including $25,000 from Kunkel, plus the bank loan, if he could not. However, this purpose was not explained in the text of the amendment, nor was any indication given of the contingent intention to effectuate a stock-for-services agreement with Kunkel. This failure was attributable to IBI's Washington communications counsel's opinion that the application form did not require such agreements to be reported.

145. Toward the end of 1972 Kunkel's stock for services plan was finally resolved. It was determined that Section 1244 did in fact preclude a stock for services arrangement. Accordingly, a new plan to compensate Kunkel for his services was evolved. He submitted a bill to the corporation based on the approximate number of hours he had devoted to corporate activities at the rate of $25 per hour plus reimbursement for certain of his expenses.[59] His bill approximated $8,000, and is to be paid in full by January 30, 1973.

146. IBI demonstrated on the record the ability of its remaining stock subscribers to meet the balance of their commitments, thereby insuring the $225,000 of paid in capital which is a pre-condition of the bank loan.

147. Jack C. Brinson has subscribed for 62.5 shares (12.5%) of IBI stock at $500. Thus, his total liability is $31,250, with an unpaid balance of $24,812. To support his ability to raise this sum IBI originally proffered his balance sheet of December 31, 1969. It showed no liabilities, and included the following assets: cash $4,500; insurance cash value $500; stocks listed on American Exchange "in excess of $35,000"; and corporations $10,000.

148. In the summer of 1970 Brinson sold his listed stocks. He used part of the proceeds plus a $150,000 bank loan to acquire a controlling stock interest in the Bank of Versailles, Versailles, Indiana. The bank stock was valued at some $390,000. He did not report this transaction to IBI, hence, the corporation did not report it to the Commission pursuant to Rule 1.65.

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[56] A Vice President of the bank explained that the bank would not consider $225,000 of paid in capital as being impaired if portions thereof were to be expended in the prosecution of the instant application.

[57] The shareholders have agreed to provide the needed guarantees.

[58] Kunkel has recently increased his financial commitment to IBI by acquiring the 16¼ shares of stock issued to Mr. W. Shannon Hughes for the sum of $8,250. However, Kunkel paid Hughes for these shares out of other assets, and the $28,000 loan commitment for his original allotment of shares remains undrawn upon.

[59] Both Kunkel and IBI realize that he must rely in part on memory in preparing his bill. Hence, it is unlikely to be completely accurate, but both parties have accepted the arrangement.

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149. Brinson and all of the other IBI stockholders were aware of Rule 1.65. The corporation's communications lawyer had advised them of the rule and that it required reports if any of the information about them was "no longer substantially accurate and complete in all significant respects". Counsel had elaborated for Brinson with respect to financial information by stating that anything which might impair his ability to pay for the stock should be reported.

150. Around October, 1971 Brinson purchased real estate valued at $50,000, assuming a 25-year $37,500 mortgage. Again, he did not report because he did not regard the transaction as affecting his ability to meet his IBI stock subscription.

151. In early 1972 Brinson acquired a 10% interest in a partnership which acquired certain land for the purpose of building an office building. The partnership assumed a $350,000 mortgage for which Brinson and his co-partners are jointly and severally liable. Here also he did not report the matter because he did not think it impaired his ability to buy the IBI stock.

152. On November 30, 1971 Brinson secured a bank line of credit in the sum of $25,000 as a source of funds with which to buy the IBI stock. On June 28, 1972, the line of credit was increased to $28,000, the bank specifically considering Brinson's participation in the land partnership described at paragraph 151, *supra*. In the meantime his net worth has increased substantially. An October 31, 1971 balance sheet shows assets exceeding $500,000: cash $50,000; bank stock $391,000; real estate $50,000; bonus receivable $11,000; apartment interest $30,000; and option on bank stock $32,000. His only liabilities were the $150,000 bank loan and the $37,500 mortgage discussed at paragraphs 148 and 150, *supra*.

153. Stanley C. Cederquist has subscribed to 50 shares (10%) of IBI stock at $500. Thus his total liability is $25,000, with an unpaid balance of $18,250. Originally IBI submitted his balance sheet as of December 31, 1969. It showed assets totalling $770,000: cash $5,700; insurance cash value $9,500; listed stocks $3,000; stocks in his own corporations $667,000; and receivables $23,000. His long-term liabilities totalled $36,000 and one year liabilities were $18,000.

154. Cederquist owns the Nicholas Company which has a $25,000 revolving credit with a local bank. He is presonally liable on any monies due on the line of credit if his corporation defaults. The Nicholas Company has average daily receivables exceeding $80,000, and the line of credit is for payroll use on those occasions when debtors have not been prompt in paying their bills. The actual use of the line of credit did not exceed $15,000 in 1970; $9,100 in 1971; or $700 in 1972. Although the debt attributable to the line of credit was deducted from assets prior to their valuation in preparing the December 31, 1969 balance sheet, the line of credit itself was not reported. This was because Cederquist did not consider this contingent liability as affecting his ability to purhchase the IBI stock.

155. Cederquist has sold the $3,000 in listed securities mentioned in the 1969 balance sheet. He did not report the sale because he did not believe it impaired his ability to meet his stock subscription.

156. In September, 1971 one of Cederquist's companies took out a $420,000 mortgage on certain real property, and he assumed personal

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secondary liability. The property securing the mortgage is appraised at $700,000. Again he did not report the affair because it did not affect his ability to buy the IBI stock.

157. Cederquist filed a new balance sheet as of November 15, 1971. Since his earlier balance sheet his assets have increased slightly, and his liquidity has remained about the same. However, in November, 1971 he obtained a bank commitment for a $20,000 loan to buy the IBI stock if such method of financing should prove convenient.

158. Herbert Simon has subscribed to 75 shares (15%) of IBI stock at $500. Thus, his total liability was $37,500. By December of 1971 he had paid in $10,125 leaving a balance due of $27,375. IBI's application included a $32,500 bank loan commitment to Simon.

159. The IBI application contained what purported to be a December 31, 1969 balance sheet for Simon. In fact, the information, which was the most current available, was as of December 31, 1968. The balance sheet showed assets of $715,000: including cash of $3,000: stocks of $187,000; and partnership in excess of $500,000.[60] In May of 1970, when a new balance sheet was prepared the value of his stocks had been reduced to some $215,000, and as of December 31, 1970 they had further reduced in value to about $55,000. Over this period his net worth was increasing, and he did not report the diminishing value of his stock holdings because he did not believe that his ability to buy the IBI stock had been affected.

160. Mr. Simon, with his brother, are the principal owners of a firm in the business of constructing shopping centers. He and his brother personally guarantee 15% of the construction loans for these centers, although their guarantees are not required on the permanent financing. The sums guaranteed in the 1968–71 period have run into the millions of dollars, although the brothers have never been called on to make good on any defaulted loan. Simon did not report these contingent liabilities because he did not believe they affected his ability to pay for the IBI stock.

161. Walter S. Blackburn has subscribed to 25 shares (5%) of IBI stock at $500. Thus, his total liability is $12,500, with an unpaid balance of $10,675. The IBI application included a bank letter committing itself to a loan to Blackburn for $12,500. The application also included a December 31, 1969 balance sheet for Blackburn which was correct as of that time.

162. In January, 1971, Blackburn and two partners borrowed $150,000 from a bank in order to buy an office building. In December, 1970 Blackburn borrowed $3,000, since repaid, to invest in a liquor store. He did not report these transactions because he did not believe they affected his ability to purchase the IBI stock.

Issue No. 24: Comparative

163. Indianapolis Broadcasting, Inc. is an Indiana corporation. Its principals, all of whom are directors and all of whom except Mr. Kunkel presently reside in Indianapolis, are: Stanley G. Cederquist, President, and 10% shareholder; Jerry L. Kunkel, Executive Vice

[60] Actually, the balance sheet understated Simon's assets. He did not know most of his fellow stockholders in IBI, and did not want to reveal fully his holdings to them. His true net worth at the time exceeded $1,500,000.

President and 15.8% stockholder; Jack C. Brinson, Vice President and 12.5% stockholder; Murray J. Feiwell, Secretary-Treasurer and 5% stockholder; John S. Ansted, 15% stockholder; Walter S. Blackburn, 5% stockholder; James N. Calhoun, 3.3% stockholder; Howard S. Mills, Jr., 5% stockholder; Herbert Simon, 15% stockholder; Jack B. Simpson, 10% stockholder; and L. Gene Tanner, 3.3% stockholder.

164. The only IBI shareholder who would be employed full time at the station would be Mr. Kunkel. He would move to Indianapolis from his home in Evansville, Indiana and take up the position of General Manager. Kunkel entered broadcasting as a part-time announcer on KCRC, Enid, Oklahoma in 1953. Between 1959 and 1961 he was an air personality and assistant program director for WKY–AM and TV, Oklahoma City, Oklahoma. From 1961 to 1963 he was radio program director and air personality at KONO–AM and TV, San Antonio, Texas. In 1963 and 1964 he was an air personality and music director at KBOX, Dallas, Texas. During 1964 and 1965 he was operations manager and air personality at WIBC, Indianapolis, Indiana. From 1965 to 1967 he was program manager at WATI. Indianapolis. Since January, 1968 he has been a salesman with WTVW–TV, Evansville, Indiana. He serves as a member of the finance committee of the Episcopal Diocese of Indianapolis, and holds membership in two clubs in Indianapolis.

165. Certain of the other IBI shareholders plan to devote a portion of their time to the proposed station. Mr. Brinson would devote some 16 hours a week to financial and business affairs; Mr. Ansted, who was 24 years of age at the time of the hearing, would devote a similar amount of time as liaison with youth groups; Mr. Blackburn would spend some 8 hours a week as liaison to minority segments of the community; Mr. Cederquist would devote about 2 hours a day to administrative and supervisory duties; Mr. Feiwell, an attorney, would devote about 2 hours a week to the station's legal affairs; Mr. Calhoun estimates he would devote 10–12 hours weekly to transportation matters; Mr. Simon would devote some 4 hours a week as consultant to the sales department; and Mr. Tanner would spend about one hour a day on preparation of financial programs to be broadcast by the station.

166. IBI itself holds no interest in any media of mass communications. None of its stockholders have any interest in any broadcast stations, but three have a slight involvement with CATV. Messrs. Brinson, Feiwell and Kunkel each own 25% of the stock of Community Teleception, Inc. Community holds non-exclusive franchises for CATV systems in New Castle and Edinburg, Indiana, each some 30 miles from Indianapolis. No construction under either franchise has been undertaken or is contemplated. Brinson and Kunkel also each own 10% of Hunt Cable Corp. which has a non-exclusive franchise for Huntington, Indiana. However, no construction has been undertaken or is contemplated in Huntington. If IBI should prevail in this hearing the owners of these CATV interests plan to divest them.

167. The principals and relationships of Star Stations are set forth at paragraphs 6 and 7, *supra*. In addition to the broadcast interests

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set forth at paragraph 6, *supra*, there is on file an application for a new FM station at Portland, Oregon. Star is not otherwise associated with any other instrument of the mass media of communications. The programming of WIFE and Star's other stations is discussed at paragraphs 134–7, *supra*. Other aspects of the stations' relevant performance are discussed at various portions of the findings which have gone before. However, the Commission's conventional standards of comparison require somewhat more detailed discussion of Star's past and proposed integration of ownership and management.

168. Mr. Burden maintains his principal office in Omaha, but he devotes approximately one-third of his time to the Indianapolis stations. He maintains an apartment in Indianapolis, and visits the city 2–4 times a month for periods of from one to five days. He receives weekly reports from each of the station's department heads, and is in daily communication with the general manager. In addition Burden meets with all of his station's executives at management meetings held 2 or 3 times yearly and lasting a week to ten days.

169. Mr. Burden has been active in broadcasting since the 1940's, and has had ownership interests since 1953. His principal civic activities are conducted in the Omaha area.

170. Mr. Kiley has been since 1965 and would continue to be the full-time general manager of WIFE. He is a native of Indianapolis. He entered radio in 1959 as a salesman and has been associated with WIFE or its predecessor since that time. He is active in local civic groups.

171. Gerald L. Weist resides in Omaha but supervises the engineering operations of all of the Star group. He makes four or five visits to WIFE each year, staying one to six weeks.

CONCLUSIONS

Issue No. 1: Sec. 315; Rule 73.120(c)

172. In 1964 47 USC 315(b) provided that station charges to legally qualified candidates for public office "shall not exceed the charges made for comparable use of such station for other purposes". Rule 73.120(c) provided that "a candidate shall, in each case, be charged no more than the rate the station would charge if the candidate were a commercial advertiser . . ." The record indicates that certain programs of five and fifteen minute duration were broadcast on behalf of Senator Hartke, but that the WIFE's rate cards contained no standard charge for programs of such length, either political or commercial. Accordingly, rates were established on an *ad hoc* basis. There is no evidence indicating that any other advertiser, whether political or commercial, was charged different rates for similar programs. Indeed, there is no evidence that any other advertiser, whether political or commercial, sponsored programs of similar length at or about this time. Under such circumstances no conclusion adverse to WIFE is warranted.

173. In arriving at the foregoing conclusion, and similar conclusions on other issues, the presiding Judge has considered, and specifically rejects, the Broadcast Bureau's contention that Star's failure to offer

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affirmative evidence disproving its guilt requires a conclusion that it is, therefore, guilty. While it is true that Star has the ultimate burden of proving that it possesses the requisite qualifications to be a licensee, that burden does not entail the affirmative duty of proving itself innocent of the allegations implicit in the individual issues. The order of designation imposed upon the Bureau the burden of proceeding with the initial presentation of evidence on Issues 1–19. This is not a meaningless burden to be transferred *de facto* to Star through the device of presenting inadequate evidence of guilt but arguing that Star has the ultimate burden of proving that the public interest would be served by a grant of its application. What the burden of proceeding imposes on the Bureau is the duty to put in a *prima facie* case establishing the allegations of the issue. If it fails to do so it has failed to carry its burden of proceeding, and, if Star chooses to offer no evidence, that issue ceases to be a matter to be considered in the ultimate decision.

174. The necessity for such a rule is well illustrated by the state of the record with respect to Issue No. 1. Assume *arguendo* that, in fact, the Hartke programs were the only sponsored programs of five or fifteen minute duration broadcast by WIFE in the fall of 1964. In that event *there would never have existed any evidence* as to rates charged for similar programs. Yet, under the Bureau's theory, Star would stand convicted for failure to produce evidence which never existed. This result would be rational only under an adjudicatory system which presumed Star to be guilty until it proved itself innocent. The presiding Judge is unaware of any Commission pronouncement that its hearings are to be conducted under such a distortion of the traditional American concept of justice.

Issues 2 and 3: Political Spot Announcements

175. It is concluded that in 1964 WIFE undertook to violate 18 USC 610 which, in pertinent part, forbids corporate contributions or expenditures on behalf of candidates for federal office. It did this by entering into a sham contract whereby it broadcast a substantial number of spot announcements on behalf of a candidate for the United States Senate without any genuine expectation of receiving payment. It has been found that, although circumstances create suspicion that Don the station's then general manager, Ronald M. Mercer. It has further been found that, although circumstances create suspicion that Don Burden was either involved in or condoned the plot, there is no solid credible evidence proving Burden to be implicated. As the Commission has observed, "suspicion, speculation, and conjecture are not proper substitutes for evidence, and cannot of themselves form the basis for conclusions that an applicant engaged in improper conduct . . .", *WORZ, Inc.*, 22 RR 125, 126c. Hence, it is not concluded that this record proves that Don Burden was party to the scheme to violate 18 USC 610.

176. The previous conclusion does not compel the concomitant conclusion that WIFE violated the fairness doctrine. Undeniably, the fairness doctrine may be applicable in the case of political broadcasts, *Arthur W. Arundel*, 14 RR 2d 180; *Democratic National Committee* v. *FCC*, 460 F2d 891. However, it is applicable only to the extent that

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the station may have failed to afford appropriate opportunity for the presentation of contrasting viewpoints. This record contains no showing of any kind directed to the opportunities afforded by WIFE for the presentation of the viewpoint of those favoring the election of Senator Hartke's opponent. Absent such evidence, no conclusion can be formulated.[61]

Issue No. 4: Distortion of Newscasts

177. It is concluded that during the 1964 Indiana senatorial campaign WIFE misused its newscasts by utilizing them as a vehicle to publicize one of the candidates. In reaching this conclusion the presiding Judge in no way comments upon or considers the station's news judgment. It is entirely possible that WIFE's newsmen might have formed the legitimate opinion with respect to every newscast that some activity of Senator Hartke's had been newsworthy and merited comment. Had such been the case, the decision would have been beyond the legitimate reach of this Commission.

178. However, that is not what happened. The newsmen were directed to mention the Senator on every newscast. Their instructions were prospective in nature, and there was no way that it could have been known in advance that the Senator would actually do something newsworthy at any given time. Thus, the instructions could not have been related to any news judgment, and could only have been for the purpose of providing the Senator publicity in the guise of news. Such action is a form of "slanting" the news which amounts to a fraud upon the public and is patently inconsistent with the licensee's obligation to operate his facilities in the public interest, *Network Coverage*, 16 FCC 2d 650, 657.

179. Again the direct evidence places the blame on Mercer's shoulders. He was the one who gave the orders. There is no direct evidence that he was acting on Burden's instructions other than his own testimony, and for the reasons noted heretofore that is not to be accepted absent substantial corroboration.

180. However, in this instance there is a circumstantial chain leading toward Burden. The record indicates that the situation was brought to the attention of Steve Brown, Burden's lieutenant, and that Brown condoned rather than corrected it. While this fact is not of itself sufficient to prove that Burden was the instigator of the misuse of the newscasts, it does establish Star's higher management to be chargeable with actual knowledge of what was happening. If Brown was aware of the facts, Burden cannot reasonably claim that they were concealed from him through Mercer's deceit. Brown was Burden's ally, not Mercer's, and Star cannot escape responsibility for cognizance of activities of which Brown was not only aware but participated in.

Issue No. 5: Political Broadcast Reports

181. The theory of this issue is that, by reporting the Hartke spots as having been paid for, Burden knowingly filed a false report in December of 1964. Such a conclusion cannot be reached. The parties

[61] One may suspect that in framing Issue No. 2 the Commission intended to speak in terms of Sec. 315 of the Communications Act rather than of the fairness doctrine. Nevertheless, the issue was heard and can be decided only on the basis of its actual wording.

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assume that WIFE's political report must have included the Hartke spots, but the record does not actually establish that vital point. However, of at least equal importance, it has been concluded that the record does not prove that Burden, who signed the report, knew in December 1964 that the spots were not to be paid for. Absent proof that he knew the receivable to be uncollectible, it could not be concluded that its inclusion in the report constituted a knowing falsehood.

Issued No. 6: Lack of Candor

182. The scope of this issue is defined by the Bill of Particulars filed by the Broadcast Bureau on December 3, 1970. That Bill alleges two specific falsehoods: Burden's denial of an intention to give Senator Hartke free spots or favorable mention on WIFE's newscasts; and Steve Brown's denial that he gave instructions as to how to insert "plugs" on behalf of the Senator in WIFE newscasts. It has been concluded that the record fails to establish that Burden knew of the plan to give Senator Hartke free spots, and it follows that no unfavorable conclusion should flow from his denial.

183. With respect to the statements relating to the newscasts a different problem is presented. Brown's denial of participation in the affair has not been accepted, and Burden has been held chargeable with knowledge through Brown. However, it does not follow automatically that their denials require unfavorable conclusions on this issue.

184. The presiding Judge has, of course, based his findings and conclusions on what he deems to be substantial evidence in the record. However, the record is far from clear and unambiguous. It is based upon vague memories and filled with conflict. When dealing with such a record the trier of fact must be acutely conscious of the possibility of error. The record is far too imprecise to warrant conclusions that simply because a witness' story has not been accepted that witness has lied.

185. The findings and conclusions on Issues 1–5 reflect the conduct of Star and its principals with respect to the matters covered by those issues. The applicant should be judged on the basis of that conduct, and, in the absence of very strong and unambiguous proof of deliberate falsehood, should not be exposed to additional jeopardy because it chose to deny the charges against it. Since this record contains no such proof, no adverse conclusions will be reached under this issue.

Issues No. 7 and 8: The Oregon Senatorial Campaign

186. These issues present especially difficult questions of both fact and law. First, it must be decided as a matter of fact, whether Burden's plan for covering Oregon's 1966 senatorial campaign, was designed to favor one contestant over the other. Plainly, Burden was aware that as of the day KISN's campaign coverage started the advantage would lie with Governor Hatfield. He was actively campaigning the state whereas Congressman Duncan was spending most of his time in Washington. This, full-time coverage of both campaigns would be *de facto* full-time coverage of the Hatfield campaign and *de facto* part-time coverage of the Duncan campaign.

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187. On the other hand, the record fails to demonstrate that Burden knew how long Duncan intended to be a part-time campaigner, or just how extensively Hatfield intended to campaign through election day. Plainly, if the intensity of the local campaign efforts of the two men were to be reversed, as is common in political campaigns, KISN's coverage would backfire if it were really intended to benefit Governor Hatfield.

188. Star and its principals claim that their intentions were honorable, and the circumstantial evidence generally supports them. Coker did in fact cover Duncan's appearances in the state. Although Hatfield did receive more frequent mention on KISN newscasts than did Duncan, the disparity is not great and may be fairly attributable to the fact that Hatfield's more extensive campaigning in late September and early October simply created more newsworthy events than did Duncan during that period. Significantly, there is not a shred of evidence that any KISN mention of Congressman Duncan was in any way unflattering. From this it would follow, if Anderson's story were to be accepted, that KISN's entire staff elected to defy Burden's instructions that only negative stories regarding Duncan were to be carried. This seems especially unlikely in view of Anderson's claim that he believed his own disregard of Burden's orders resulted in his immediate dismissal.

189. Indeed, the only circumstance supporting Anderson's story is the failure to prepare and broadcast promotional announcements on the Duncan coverage. If the station's coverage was to be of both campaigns it is difficult to perceive why the promotional announcements were not directed to that simple fact rather than separate promotions for the coverage of each campaign. Nevertheless, the art of program promotion is just that, an art. KISN's staff might reasonably have held the opinion that the coverage of the two campaigns could best be promoted separately, and that the Duncan promotion should best await the start of his full-time campaign. Thus, although the failure to prepare Duncan promos is suspicious, it is far from reasonably conclusive proof that KISN did not intend full coverage of the Duncan campaign when it moved to Oregon.

190. In short, there is no real evidence to support Anderson's story, and his version of events is highly suspect. Plainly, his primary motive was to find a way to break his contract with KISN in order to advance his career. His tale will not be preferred to the denials of all of the other individuals having knowledge of the facts.

191. Finally, there is to be considered whether the decision to cover Hatfield's full-time campaign at a time when Duncan was only campaigning part-time was in itself a violation of the fairness doctrine. It is concluded that it was not. Indeed, the fact that the allegation is laid at all illustrates the ease with which an over zealous application of the fairness doctrine can transform that doctrine into a caricature of fairness.

192. As an academic proposition, a station's decision to supply full-time coverage of a political campaign would seem to be the very essence of operation in the public interest. Yet, such a decision by no means implies that the candidates will receive equal time and attention

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on the station. Some candidates may elect a frenetic approach involving frequent appearances and statements as to position. Others may choose to say and do little. If two such candidates oppose each other it is to be expected that full-time coverage of each will result in greater exposure for the more active campaigner. Yet this would not constitute a violation of the fairness doctrine. There would have been no denial of an opportunity for presentation of opposing viewpoints. There would be simple recognition of the fact that one candidate was more newsworthy than the other, whether to his political advantage or disadvantage. This record indicates that in the late September to early October period covered under this issue Congressman Duncan was frequently mentioned on KISN, even if not as frequently as Governor Hatfield. Thus, the viewpoint of the Duncan campaign was being presented, and the fairness doctrine was not being violated.

Issue No. 9: Corporate Contribution to Hatfield

193. This issue stands entirely on the testimony of Dorothy Storz. She drew the $1,000 check; she cashed it; she disposed of the proceeds; and she made the entries in the books or ordered them made. Three things contradict her: the inherent improbability of simply mailing so large a sum in cash undirected to any individual and unaccompanied by any message; Burden's denial of the whole incident; and the general denial and incredulity of both Senator Hatfield and his staff member who signed the receipt for the envelope which supposedly contained the cash. Mrs. Storz' unsupported testimony does not outweigh the denials, and this record does not warrant a conclusion that Burden ordered $1,000 of corporate funds to be sent as a contribution to the Hatfield campaign.

Issue No. 10: Lack of Candor

194. According to the Broadcast Bureau's December 3, 1970 Bill of Particulars, this issue is based on Burden and Shepard's denial that KISN's coverage of the 1966 senatorial campaign was designed to favor Governor Hatfield, and on Burden's denial that he authorized a corporate contribution to the Hatfield campaign. It has been concluded that this record fails to establish that those denials were false. It follows that no lack of candor has been proven.

Issue No. 11: KISN Zoning

195. The record establishes that Mr. Burden obtained $10,000 from Star's stockholders for the purpose of political activity in the Portland area. Clearly, he hoped to secure sympathetic consideration of a then-pending zoning matter, and intended to use the money to that end. However, the record totally fails to reveal the specifics of what he intended to do. Possibly he intended to try to bribe someone: his obtaining such a large sum in cash warrants that suspicion. Yet, it can be no more than a suspicion. The record does not speak to the details of how he intended to use the money, and his intent could as well have been proper. The only conclusion that can be reached is that the record does not reveal what Burden planned on doing with the money, and that in the end it was paid out to Star's stockholders. That is to say, no matter of decisional significance has been proven.

196. The evidence as to the check drawn to Del Easley does not even warrant a suspicion of impropriety. No one remembers why the check was drawn, and it was never delivered. To suggest impropriety would be entirely conjecture, and no conclusion adverse to anyone would be justified.

Issue No. 12: Lack of Candor

197. It having been concluded that no impropriety has been proven under Issue No. 11, it follows that the denials of impropriety are not to be concluded to constitute evidence of lack of candor.

Issue No. 13: Hooper Gifts

198. Mr. Burden is a close friend of Frank Stisser. In 1965–66 Stisser was President of C. E. Hooper, Inc. During this period Burden gave Stisser a yard tractor and twice permitted him to use Star "due bills" to pay expenses at a Las Vegas hotel. The gifts were of more than nominal value, although both Burden and Stisser knew that Star had obtained them in trade-out deals at something less than their face value. However, the record does not indicate that Burden ever sought, much less received, any unusual treatment from Hooper.

199. These facts do not warrant any conclusion adverse to Star or Burden. While there can be little doubt that an attempt to bribe a rating service would reflect adversely on the qualifications of a licensee, this record totally fails to prove any such attempt. Burden and Stisser both maintain that the gifts stemmed from simple friendship, and there is nothing to dispute them. If a bribe or attempted bribe is to be proven, it must be shown that something was asked and/or given in return for the favor done. Such a showing is not even attempted on this record.

Issue No. 14: Telephone Call of Government Witnesses

200. The record fails to establish that Star monitored the calls of any government witness. The whole case in support of monitoring rests on the testimony of Dorothy Storz, whose only knowledge rested on a brief conversation she had with Steve Brown. She did not claim to know just what monitoring activities had taken place, or even who had been monitored.

201. Star, on the other hand, denied that any monitoring activities took place, and it produced the hotel's telephone operators to join in that denial. Thus, on the one hand there is the hearsay evidence of one witness that something happened, she knows not what. On the other hand are the specific denials of those supposedly involved that any monitoring took place. On such evidence it cannot be concluded that any telephone calls were monitored.

202. What is proven to have taken place was a query by Burden of the hotel switchboard operator as to whether his former secretary, a government witness, had placed any telephone calls. While it is indiscrete for a principal of the licensee in hearing to make such an inquiry, it is not unlawful. No statute or Commission rule renders such information privileged in any way. The licensee in hearing has precisely the same right to investigate the background and activities of the Bureau's witnesses as the Bureau has to so investigate theirs. Unless

the investigation involves illegal acts, no adverse inference is to be drawn because it was conducted.

Issue No. 15: Fire Insurance Claims

203. The record does not warrant any conclusion adverse to Star or its principals on this issue. All that can be concluded is that there was a fire in which some property, including cameras, was damaged; that Burden gave away some of the damaged cameras to onlookers at the site and removed others which he later threw away; that he entered a claim for all of the cameras; that the insurance carrier disputed the claim; and that Star eventually reduced the amount of its claim. The record permits no further finding. It does not purport to show the basis on which the carrier contested the claim. Thus, it is unknown whether the carrier suspected that not all of the cameras had been in the burned building; or whether it contended that Burden's giving away and removing some of the cameras limited its liability. In other words, this record does not even show what the dispute between Star and its insurance carrier was: whether it arose out of *suspected* fraud; or from a question of policy interpretation.

204. Nor does the conclusion vary if the testimony of Miss Rudol is considered. While she suggests that Burden doctored a letter in support of a fraud, her testimony seems unlikely. First, she contends that what Burden did was to alter a letter from the supplier of the cameras because that letter indicates that some of the cameras were shipped directly to Indianapolis and Portland and were never in Omaha at all. However, the original invoice plus a note in her own handwriting indicate that was not the case, and that, in fact, all of the cameras were shipped to Omaha originally.

205. Second, if Miss Rudol's testimony is true it could have been conclusively proven by simply introducing the camera supplier's copy of its letter to Star, and the insurance company's copy of its letter from Star. The failure to take this elementary step, or to explain why it was not taken, compels the conclusion that the physical evidence would not have supported Miss Rudol's testimony.

206. Finally, there is the total failure of the record to establish why, if Miss Rudol's testimony is assumed to be true, it is significant. Star had never claimed that all of the 100 cameras it originally received were damaged in the fire. It only claimed the loss of 72 of them. Thus, there is no apparent motive for Burden to wish to conceal from the carrier that some of the 100 cameras were never shipped to Omaha, if that were the case.

207. In short, the record does not even define what the fraud was, much less prove it.

Issue No. 16: Rule 1.613(c)

208. Rule 1.613(c) requires that "contracts relating to the sale of broadcast time to 'time brokers for resale'" must be reported to the Commission within 30 days of the execution thereof. Between January 1, 1965 and April 30, 1970 there was in effect a contract between KOIL and the Omaha Food Retailers Association whereunder the Association paid KOIL to sponsor the "Grocery Boy" program daily, and in

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turn sold spot announcements on the program, primarily to its own members. That contract was not timely reported to the Commission.

209. Although there is no precedent to guide the decision on this issue, in the opinion of the presiding Judge the rule was not violated. The rule does not require the reporting of all contracts relating to the resale of broadcast time, only such contracts as are entered into with "time brokers". Hence, unless the reference to "time brokers" is deemed to be redundant and superfluous, time resale contracts need be reported only when they are entered into with that category of person.

210. The term "time broker" is not defined in the rules, but it is reasonably related to one whose primary activity is the purchase of broadcast time for resale to whatever advertiser may be found. Such is not the case here. The Association sponsors the "Grocery Boy" program only incidentally to its primary activity. It resells the spots to its own members, or those in the same business, not to any advertiser who may become interested. This does not appear to be the sort of arrangement which the Commission believed needed to be regulated, or the sort toward which the rule was directed. No conclusion adverse to Star will be reached on this issue.

Issue No. 17: Contests

211. Star's contest procedures have centralized responsibility. The details of all contests must be cleared with Steve Brown, and he clears the matter with counsel in contests involving prizes of substantial value. After final approval to run the contests has been obtained each station's Program Director goes over the rules for each contest with all of the station personnel involved. When the contest is in progress the rules are read verbatim over the air twice a day.

212. These procedures seem reasonably designed to protect the public from fraud and deceit, and this record indicates that they have worked well in practice. Of the hundreds of contests run during the period covered by the Bureau's investigation only two are shown to have resulted in irregularities. In both instances the impropriety was discovered through the licensee's own vigilance, prompt and thorough investigation was undertaken, severe disciplinary action was instituted against the individuals responsible, and the Commission was fully and voluntarily advised of what had occurred. In short, Star has conducted itself in a thoroughly responsible fashion with respect to the conduct and overseeing of its contests.

213. Nor does the record indicate that Star has undertaken to mislead the public as to prizes to be awarded. These charges are concerned with the "13 Car Sweepstakes" which was broadcast over each of the Star stations in April of 1966. Apparently the original promotions for the contest were ambiguous as to what was to be given away. However, this fact was brought out at a management conference and the promotions were modified before they were put on the air. Additionally, the program directors were told that care should be taken to make the nature of the prize clear to their listeners.

214. Thus, it does not appear that Star's intention was to deceive. However, it did not succeed in completely removing the ambiguities in its promotions. Read as a whole, the announcements listed at para-

graph 106, *supra*, make it clear that only one car was to be given away. However, it must be remembered that the listening audience did not hear the promos as a whole. They heard them individually with other programming intervening. Thus, a given listener might hear only one of the announcements, and some of them, considered alone, remained ambiguous as to whether one or thirteen automobiles were to be awarded. Indeed, the record indicates that some confusion did arise, and that some people thought thirteen cars were to be given away.

215. However, considering the record as a whole, any ambiguity and confusion involving these contests was an isolated phenomenon, and was the result of simple error rather than deliberate deceit. The danger in the promos was discovered by management and reasonable steps were undertaken to avoid it. Although those steps were not wholly successful, such individual imperfections do not rise to the level of decisional significance in the absence of proof that they were willful or intentional.

Issue No. 18: Trade-Out Accounting

216. The record does not support any conclusion adverse to Star on this issue. Indeed, it consists only of Mrs. Storz' testimony that she was instructed to deny access to national trade-out information to auditors for music licensing firms, and her opinion that this was so such firms could be defrauded of their rightful commissions. Absolutely nothing further was offered. The auditors were not called; Star's trade-out books were not offered; there was not a shred of proof that the music licensing firms did not ultimately receive full information, or were in any way dissatisfied with Star's conduct. Here again, it is concluded that the party having the burden of proceeding with the introduction of evidence on the issue has simply failed to make out a *prima facie* case of decisionally significant conduct.

Issue No. 19: Harassment of Witnesses

217. Ron Mercer believes himself to have been harassed by Star and its personnel. As has been noted, the matter of harassment is an area where Mercer has been demonstrated to have given false testimony. That testimony is one of the reasons why the presiding Judge finds himself unable to accept Mercer's uncorroborated testimony. Nevertheless, the record demonstrates that Mercer's feeling of hostility toward Star is reciprocated. Star has, on occasion, declined to treat Mercer as it treats other advertising agents, and its principals have spoken of him in unflattering terms within the business community.

218. However, it does not follow that Star's actions demonstrate the purpose of frustrating or interfering with the Commission's processes. If that was Star's intent, it follows that the motive therefor would be to persuade Mercer to cease giving adverse testimony. Yet, the record contains not a hint that such a thought was ever in any way communicated to Mercer. Rather, the record seems to indicate that what the Star people did was the result of hostility and fury. Undeniably they spoke disparagingly, but there is no proof they ever spoke falsely. While such conduct is not to be admired it falls short of proof of an attempt to harass or intimidate a witness.

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219. Mercer's claim that Steve Brown tried to influence his testimony through sympathy is simply incredible. It is clear that the two men met socially, and that the then upcoming 1966 hearing was discussed. However, the record does not indicate that the two were close. It does not establish why Brown might have believed that Mercer would commit perjury simply to protect the value of Brown's stock. It seems more probable that Mercer read into their conversation something that wasn't there. The evidence regarding the incident is simply too flimsy to warrant any adverse conclusion.

220. The record justifies a conclusion that an attempt was made to record a conversation between Louise Rudol and Judy Gunson. The conversation was to be about Miss Rudol's interview by FCC investigators. However, in the event, the conversation was not actually recorded.

221. While such tactics induce a feeling of distaste, they do not warrant an adverse conclusion unless it has been established that it was improper for Star to talk to Miss Rudol about her FCC interview or improper for Star to record such conversation. Neither fact has been shown.

222. An individual does not become sacrosanct simply because he has been interviewed by government investigators. Other interested parties have a perfect right to talk to such people and to ask them what they told the investigators. Of course, the witness has a right to refuse the interview, or anything else. But, that is not what happened here. Miss Rudol simply declined to discuss the matter over the telephone, and the dinner was set up for the very purpose of talking about it face to face.

223. Nor was the proposed surreptitious recording of the conversation improper unless its circumstances were unlawful or the tape was intended to be used to harass or intimidate Miss Rudol. This record contains not a crumb of evidence tending to prove either point. It is not shown that recording the conversation would have been violative of any law, nor is there any evidence as to Star's motive for wanting the recording.

224. The charge that Burden made harassing telephone calls to Miss Rudol while she was waiting to testify in the 1966 hearing is very serious. However, again the weight of the evidence fails to support the charge. First, it is uncertain just how many calls were made or just when they were made. Insofar as Miss Rudol testified to anonymous calls, there is nothing in the record, other than suspicion, to connect them to Star. Insofar as she recognized voices, Burden and Brown have denied her testimony. There is no reason to believe her version of events over their denials.

225. Indeed, the circumstantial evidence favors the denials. Miss Rudol says she kept a record of the calls and gave it to the Bureau lawyer trying the 1966 hearing. Thus, her testimony is that *at the time* she told the government lawyer trying the case that his witness was being intimidated; she told him who was doing it; and she even told him where the calls were coming from. It is simply beyond belief that in such circumstances the prosecutor would do nothing. An affidavit of what Miss Rudol testified to would almost certainly war-

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rant a court order permitting both Miss Rudol's telephone and Mr. Burden's telephone at the Essex House to be tapped. Her charges, if true, would have been quickly proven and the consequences are predictable. Yet, this record contains no hint that anything was done. Indeed, the Bureau did not even retain the list Miss Rudol says she gave its representative. It appears that Bureau takes Miss Rudol's charges more seriously in 1973, when they can't be proven one way or the other, than it did in 1966 when they were simple of proof. No adverse conclusion is warranted on the charges of harassing telephone calls to Miss Rudol.

226. Shepard's actions in 1970 with respect to Harl Huebner are deserving of censure. There was absolutely no reason for him to call Huebner's employer unless he hoped to get Huebner in some sort of trouble. The incident is especially culpable because Shepard had no real basis for believing that Huebner had given false testimony to the FCC. Shepard had no personal recollection of the incident about which Huebner had spoken. He had no way of knowing whether Burden's story was closer to the truth than Huebner's. Thus, his action can only be understood as a striking out against Huebner because the man told a story somewhat adverse to Star's interest. Such is the essence of harassment of a witness.

227. No adverse conclusion will be reached because Kiley told Star employees Byers and Porter that they were entitled to counsel when talking to FCC investigators or because he made Star's own lawyer available to them. As was noted at paragraph 222, *supra*, a witness has a perfect right to refuse to discuss what he knows with a party to an FCC proceeding. This right of refusal extends to the Commission itself, its staff and its investigators. An individual cannot be compelled to talk to anyone in connection with an FCC proceeding absent formal process, and if such process issues the witness is entitled to counsel. Thus, when Kiley told Byers and Porter that they were entitled to have a lawyer present when they talked to Commission investigators he spoke the simple truth, and he is not to be censured therefor.

228. Nor was it improper for Star to make its own lawyer available to its employees. Plainly, there is a possibility that an employer's interest may conflict with the non-incriminating obligation of the employees to divulge facts within their knowledge. However, it is to be presumed that a member of the bar is conscious of this possibility, and will take appropriate action if an actual conflict becomes apparent to him. This record does not even suggest than an actual conflict arose or that any impropriety of any kind occurred. Nor does it suggest any reason why the employees involved should have preferred to retain new counsel whom they would have to pay themselves. It is not without irony that under an issue concerned with the mishandling of witnesses, prosecutorial zeal has led the Bureau into a position where it advocates a course which, however unintentionally, would inevitably chill for economic reasons some witnesses' exercise of their right to be represented by counsel.

229. Finally, it is concluded that the record fails to establish that Steve Brown's job offer to Mr. Barr in 1969 or 1970 was anything but

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legitimate. Barr regarded the offered salary as too high for the value of his services. However, the record fails to indicate that Barr had any real knowledge of the appropriate recompense for the duties involved. There is no indication that Brown even spoke to him about his testimony, much less sought to influence it. Finally, there is the fact that Barr had already given sworn testimony, and it is simply unlikely that Brown would have believed that he could be induced to change it. Here again suspicion and speculation have failed to rise to the level of proof, and no adverse conclusion is warranted.

Issues 20–22: Significance of Conclusion on Issues 1–19

230. On issue after issue the ultimate conclusion has been that the charge has been unsubstantiated. Conjecture, suspicion and speculation have been substituted for fact. The Bureau has been forced to rely on certain witnesses who were confused or plainly deceitful. The substantial lapse of time between events and the hearing thereon has blurred the memories of honest witnesses to the point that their testimony was too vague or too much in conflict with that of other equally sincere witnesses to permit any firm finding.

231. Nevertheless a residue of hard fact remains and certain of that is adverse to Star. It has been concluded that WIFE contracted to broadcast, and did broadcast, certain political announcements for which it had no intention of being paid. This is a very serious matter. Such conduct must be regarded as blatant disregard of a broadcaster's fundamental duty. It is, quite simply, the use of its license for the purpose of engaging in criminal conduct. Had the record contained proof that Burden was privy to what transpired this Initial Decision would end right here. Such conduct by a licensee is so far beyond the acceptable that consideration of the remaining issues would become superfluous. It would be concluded that the licensee simply lacks the character qualifications to be entrusted with the continued operation of broadcast stations.

232. However, it has not been concluded that Burden was privy to what transpired. The chain of credible proof does not extend beyond Mercer. This is not to say that Star is thereby relieved of responsibility. It is the licensee's duty to be aware of the conduct of its employees within the scope of the authority delegated to them, *KLYD*, 14 FCC 2d 292. However, when it is shown that the owner was not, in fact, aware of the misconduct of his employees, the Commission has traditionally been reluctant to conclude that such person lacks the character qualifications to be a licensee. Ordinarily, in such circumstances, the licensee's ultimate responsibility has served as the basis for some sanction, but he has been held basically qualified for renewal of license. Such disposition seems appropriate here. Although Burden failed in his duty to supervise the man managing the day-to-day operation of his station, his failure lies in the efficacy of his management rather than in his character.

233. The situation with regard to the WIFE newscasts is somewhat different. Again the charge is very serious, going to the very core of the licensee's operation of the station. Again it has been concluded that the offense took place and that WIFE newscasts were slanted

for the purpose of publicizing a political candidate. Again it has been concluded that the instructions emanated from Mercer and there is only inferential circumstantial evidence corroborating Mercer's claim that he was acting on Burden's orders. However, here it has been concluded that Mercer's actions were not contemporaneously unknown to his superiors at Star. Steve Brown knew about them at the time, and, rather than taking immediate steps to halt Mercer, he abetted Mercer in his actions.

234. This conclusion is most significant. Star's defense to the charges regarding the operation of WIFE has been that Mercer's actions were unknown to it at the time. Thus, while it does not deny Mercer's improper actions, it claims to be as much the victim of them as are the Commission and the public. This defense does not survive the conclusion that Brown had contemporary knowledge that Mercer had ordered the slanting of newscasts.

235. However, it does not follow that this incident compels the conclusion that Star lacks the character qualifications to hold a license. Certainly it is far more serious than a situation where an employee, wholly unbeknownst to the licensee and contrary to his instructions, intentionally distorts a news story. On the other hand, it is less serious than a case where the licensee himself knowingly embarks on a policy of news slanting in order to deceive and defraud the public. Placed in perspective the situation here is of an isolated instance of an employee improperly using the facility to propagandize in favor of a political candidate and of a high executive failing to take prompt corrective action when he became aware of the situation. The matter reflects discredit on Star, but, in and of itself, does not require the drastic conclusion that the applicant wholly lacks the character qualifications demanded of a Commission licensee.

236. Other than the foregoing events relating to the 1964 Indiana senatorial campaign, the matters proven against Star, its stations, or its employees are relatively minor. Two of the hundreds of contests broadcast over the Star stations are shown to have been rigged. Yet, this rigging occurred despite procedures designed to prevent it; it was discovered through Star's own diligent investigations; and it was promptly and voluntarily reported to the Commission by Star. Thus, although the rigging is to be deplored, it occurred despite, not because of, the conditions Star has set up to govern its contests. The incidents do not reasonably reflect adversely on the licensee's character qualifications to be a licensee.

237. It has been concluded that Shepard's call to Huebner's employees constituted harassment. However, the incident was an isolated one, and appears to reflect a single instance of enraged judgment rather than part of a pattern. While Star is deserving of censure for even isolated incidents of this sort, standing alone it is not so serious as to compel the conclusion that Star lacks the basic qualifications to be a licensee.

238. In sum, it has been concluded that Star was guilty of serious improprieties during the 1964 Indiana senatorial campaign. In addition, two of its contests are shown to have been rigged, and Mr. Shepard is shown to have made a telephone call which constituted

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harassment of a witness. For the reasons aforestated none of these matters, standing alone, compels the conclusion that Star wholly lacks the character qualifications required of a licensee. Nor is a different conclusion required when the adverse matters are considered collectively. No pattern of misconduct emerges. The incidents are unrelated, and, considering the extensive and intensive scrutiny Star's operations have undergone, not numerous. It is concluded that Star possesses the requisite qualifications to remain a licensee of the Commission, and that its licenses in Omaha and Vancouver should be renewed. However, as hereinafter noted, these matters are of considerable significance in resolving the comparative issue on the Indianapolis application.

Issue No. 25: Meritorious Programing

239. As noted in the Review Board's order released April 7, 1971, the meritorious programming issue was added "to mitigate adverse findings and conclusions under disqualifying issues". Hence, Star not having been found disqualified to retain its licenses, the issue has become moot. However, if the matter remained of decisional significance, it could be concluded that Star programming, while adequate and showing an appreciation of the need for community involvement, does not so far exceed the expected standard of performance as to mitigate any adverse conclusions reached. The stations' services are meritorious, but they are not shown to so far exceed average performance that a compelling public need for their continuance exists.

Issues No. 23, 26, and 27: IBI Financial Qualifications And Representations With Respect Thereto.

240. The originally designated financial issue inquired as to whether Mr. Kunkel had sufficient funds to meet his stock commitment, and whether the applicant can raise sufficient unencumbered capital to meet the condition of its proposed bank loan. Both questions are to be answered in the affirmative. Kunkel has already paid for part of his stock, and is shown to have available a $28,000 bank loan to pay for the balance. This is more than is required to meet his remaining commitment. With respect to the corporate bank loan, only $225,000 in capital is required as a condition. The corporation proposes to raise $250,000 through stock subscriptions. Each of the subscribers has demonstrated an ability to contribute the sum which he has pledged. Thus, it is concluded that IBI has established its financial qualifications.

241. The issue as to Rules 1.514 and 1.65 grows out of the failure of IBI to report in its original application certain contingent liabilities of some of its stockholders, and to amend its application to reflect changes in the form of the assets held by certain of the stockholders.

242. It has been found that at the time the application was filed Mr. Cederquist and Mr. Simon were contingently liable on debts of corporations of which they were principals. There was no circumstance with respect to either which made it appear that the primarily liable corporations were likely to default on their obligations thereby envoking the contingent liability. Nevertheless, under the governing

precedents the contingent liabilities should have been reported, and the failure to do so constituted a violation of Rule 1.514(a).[62]

243. Nevertheless, it does not appear that the violations were deliberate or reflect on the character of IBI or its principals. Neither man had any motive to conceal the contingent liabilities.[63] Each had had such liabilities for an extended period of time without any demand having been made pursuant thereto. Neither had any reason to anticipate a demand being made in the future. In other words, neither had any reasonable cause to suspect that the contingent liabilities were likely to actually affect his ability to meet his stock commitment. Under such circumstances, the technical violation of Rule 1.514 does not reflect adversely on IBI's qualifications to be a licensee. However, the technical violation is not to be entirely ignored, and warrants a very slight demerit under the comparative issue.

244. Turning to the Rule 1.65 issue, it is not concluded that any violation has been shown. The individuals involved had been told by their counsel that they were to report those financial changes which might impair their ability to meet their stock subscriptions. The presiding Judge deems this to be a precisely accurate summary of the requirement of Rule 1.65,[64] and the record indicates that IBI's principals followed the advice in good faith. Each of them was aware that he had a bank loan commitment for funds in excess of his obligation. Hence, changes in his balance sheet did not affect his ability to meet his stock commitment unless they were such as to impair the financial status underlying the bank's willingness to commit itself. This record contains not a hint that such was the case. Instead, each of the IBI principals considered under this issue has shown a picture of increasing affluence.

Issues 22 and 24: Comparative

245. As noted in the Commission's *Policy Statement On Comparative Broadcast Hearings*, 5 RR 2d 1901, there are two primary objectives toward which the process of comparison should be directed: maximum diffusion of control of the media of mass communications; and the best practicable service to the public. In a hearing such as this involving an existing station seeking renewal of license opposed by a new applicant for the same facilities the first objective presents no unusual problem. However, the second, best practicable service, is fraught with difficulty.

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[62] This conclusion is compelled by the Review Board's order released April 21, 1972, paragraph 10 and footnote 8. No discretion in the matter was left to the presiding Judge.

[63] So far as is known to the presiding Judge no applicant or entity has ever been found by the Commission to lack financial qualifications simply because they were contingently liable on the obligations of another. Perhaps because of this, such information was long regarded as superfluous and applicants were under no obligation to report contingent liabilities prior to the Review Board's decision in *Louis Vander Plate*, 14 RR 2d 309. (The order suggests that *contingent* liabilities must be balanced by *current liquid assets*, although this suggestion was never carried through to decision because of the dismissal of the application affected. *Louis Vander Plate*, 15 RR 2d 907.)

[64] In its *Report* adopting Rule 1.65, 3 RR 2d 1622 the Commission emphasized that the rule was intended to apply "where there has been a substantial change *and* where that substantial change may be significant to the Commission's consideration of an application . . ." (emphasis added). In other words a substantial change in a balance sheet is reportable only if the change may be significant to the Commission's determination of financial qualifications. Where, as here, the individuals are relying on bank loans rather than their balance sheets, the balance sheets are not significant to the Commission's determination, and even substantial changes need not be reported.

246. It must be recognized that the traditional criteria were designed to compare applicants whose services were entirely prospective. Thus, for example, the Commission theorized that a station run by its owner was more likely to be operated more in the public interest than one run by a hired manager, or that an owner-manager familiar with and active in the community was more likely to be responsive to community needs than an owner-manager foreign to the station location. While it might be argued whether any one or all of these criteria are genuine indicators of how a station will be operated, they have two virtues: they appear plausible; and they can be applied with some objectivity.

247. However, when one of the comparative applicants has actually been operating the station an entirely new element is introduced. Ordinary human experience leads to the conclusion that the past is guide to the future, and that how a station has been run is pretty much how it will be run. Thus, if a station has been run in a manner unresponsive to the needs of its community, it would be unrealistic to conclude that is likely in the future to give the best practicable service because the applicant earns high marks on all of the traditional comparative criteria. And *vice versa.*

248. On the other hand, it would be wholly unfair to the new applicant to disadvantage it simply because it has not had the opportunity to make a performance record. It can be evaluated by consideration of the traditional comparative criteria toward the end of determining how likely it is to render the sort of service most in the public interest.

249. Thus, the comparison will be between the actual service rendered in the past by the renewal applicant and the sort of service to be expected from the new applicant based on its overall showing on the traditional comparative criteria. Such a comparison lacks the appearance of objectivity obtained when exactly the same tests are applied to each competitor. However, any comparative-renewal comparison must have some appearance of unfairness, and any other method of comparison has a greater risk of actual unfairness. Conventional wisdom has it that an apple and an orange cannot be compared. Yet, the Commission has been given an apple and an orange and it must compare them. It has no choice but to test the virtues and vices peculiar to each, even those unshared, and strike an overall balance.

250. On the diversification criteria IBI is entitled to an obvious preference. Other than the ownership by three of its principals of interests in certain essentially defunct CATV franchises, of which they propose to divest themselves in the event of a grant, neither the applicant nor its shareholders has any media connections. Star, on the other hand, owns AM stations in Omaha and Vancouver and FM stations in Omaha and Indianapolis. However, the preference, while clear, is not substantial, and its does not dominate the comparison. Star's other AM stations are distant from Indianapolis and not numerous. None is shown to be the dominant voice in any market or region. Its AM and FM combination in Indianapolis do not represent even a substantial minority of the broadcast stations in the market. Thus, Star's media holdings do not grossly disserve any of the Com-

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mission's diversification objectives. Under such circumstances, the preference on diversification, while clear, is less than compelling.

251. Turning to the matter of best practicable service, IBI's showing is no better than adequate. Only one of its owners proposes meaningful day-to-day integration in the station's operation. Mr. Kunkel will be the full-time General Manager. However, he has less than a 16% interest in the corporation, and he is not a local resident. Indeed, his qualifications closely resemble those of the integrated shareholder of TV9, Inc. in *Mid-Florida Television Corp.*, 23 RR 2d 521, where that applicant's integration proposal was found to be far less significant than that of applicant's proposing the full-time integration of controlling shareholders. While other shareholders propose varying amount of participation in station affairs, those proposals either center on non-programming activities or lack the specifics of a well thought out plan. Although they are all local residents, their proposed participation does not materially improve IBI's integration showing. IBI advanced no other factor calculated to indicate the probability of better service to the public.

252. On the other hand, Star's past broadcast record cannot be characterized as other than average. The station has involved itself in the community, has improved its physical plant, and has programmed in a manner which has gained wide popular appeal. Nevertheless, it has consistently devoted 80% or more of its time to simple entertainment, and has not shown a commitment of significantly more of its resources to community needs than is expected of all licensees. While such a record is not to be faulted, it fails to establish a compelling community need for the continuation of its service.

253. If these were the only factors to be considered, the choice would be very close. However, another aspect of Star's past performance must be weighed.

254. WIFE's performance in connection with the 1964 senatorial campaign was wholly unacceptable. Its actions in attempting to give *de facto* free time to one candidate and in slanting its newscasts to publicize that candidate are serious in the extreme. Because it has not been shown that Star's owners and top managers were cognizant of what was done, Star's character qualifications have not been disproven. However, the same ignorance which protects Star's character qualifications casts a long shadow across the adequacy of its supervision of the station. Mr. Burden has attempted to show that, while he spends only ⅓ of his time in Indianapolis, his management technique is such that he actually retains day-to-day control over the operation. But, if this were so, what happened would have been simply impossible. Star cannot have it both ways: either Burden is properly chargeable with knowledge of everything that transpired at the station; or his system of supervision is such that he has failed to retain effective control.

255. It is concluded that the inadequacy of supervision by WIFE's primary owner compels a comparative demerit of sufficient substance to tip the balance. The offenses which occurred are too serious to be ignored or glossed over. The public is most likely to receive the best practicable service from an entity which has never permitted such

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blatantly improper broadcasting practices to have occurred. While each applicant has also been awarded other demerits going to their comparative qualifications, these factors are relatively minor and do not materially affect the end result.

256. In sum, IBI has been preferred on both of the basic standards of comparison. It has been concluded that a grant of its application would best serve the Commission's diversification objectives, and would be most likely to result in the best practicable service to the public. The public interest would best be served by a grant of the IBI application.

Accordingly, IT IS ORDERED, That unless an appeal is taken to the Commission by a party or the Commission reviews the Initial Decision on its own motion in accordance with Rule 1.276, the application of Star Stations of Indiana, Inc. for renewal of license of Station WIFE, IS DENIED; the application of Star Stations of Indiana, Inc. for renewal of license of Station WIFE–FM, IS GRANTED; the application of Indianapolis Broadcasting, Inc. for a construction permit for a new standard broadcast station, IS GRANTED; the applications of Central States Broadcasting, Inc. for renewal of licenses of Stations KOIL and KOIL–FM, ARE GRANTED; and the application of Star Broadcasting, Inc. for renewal of license of Station KISN, IS GRANTED.[65]

FEDERAL COMMUNICATIONS COMMISSION,
CHESTER F. NAUMOWICZ, Jr., *Administrative Law Judge.*

[65] On December 22, 1972, Star filed an Application for Review of a Review Board action released on December 15, 1972.

OPY

APPENDIX 2

FCC 75-127

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of STAR STATIONS OF INDIANA, INC. For Renewal of Licenses of WIFE and WIFE-FM, Indianapolis, Ind. INDIANAPOLIS BROADCASTING, INC. For a Construction Permit for a Standard Broadcast Station, Indianapolis, Ind. CENTRAL STATES BROADCASTING, INC. For Renewal of Licenses of KOIL and KOIL-FM, Omaha, Nebr. STAR BROADCASTING, INC. For Renewal of License of KISN, Vancouver, Wash.	Docket No. 19122 Files Nos. BR-1144, BRH-1276 Docket No. 19123 File No. BP-18706 Docket No. 19124 Files Nos. BR-516, BRH-992 Docket No. 19125 File No. BR-1027

APPEARANCES

Marcus Cohn, Martin J. Gaynes and *Joel H. Levy* (Cohn and Marks) on behalf of Star Stations of Indiana, Inc., Central States Broadcasting, Inc. and Star Broadcasting, Inc.; *Walter H. Sweeney* (Welch & Morgan) on behalf of Indianapolis Broadcasting, Inc. and *Joseph Chachkin* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted January 30, 1975; Released February 7, 1975)

BY THE COMMISSION: COMMISSIONER LEE DISSENTING AND ISSUING A STATEMENT; COMMISSIONER HOOKS NOT PARTICIPATING; COMMISSIONER QUELLO CONCURRING AND ISSUING A STATEMENT.

1. This proceeding involves the applications for renewal of broadcast license of Star Stations of Indiana, Inc. for WIFE and WIFE-FM at Indianapolis, Indiana; of Central States Broadcasting, Inc. for KOIL and KOIL-FM at Omaha, Nebraska; and of Star Broadcasting, Inc. for KISN[AM] at Vancouver, Washington. The renewal applicants are wholly-owned by the same parent corporation, Star Stations, Inc., and are sometimes referred to herein collectively as "Star" or "Star Stations." Also involved is the application for construction permit filed by Indianapolis Broadcasting, Inc. (IBI) for a new AM station in Indianapolis, which is mutually exclusive with the WIFE renewal application. Thirty issues were prescribed by the

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Commission in its designation order [1] or by enlargement of issues [2] to determine the basic qualifications of all applicants and the comparative merits of the WIFE and IBI proposals. Since these issues are set forth in full in paragraph 1 of the Initial Decision, they will not be reiterated here.[3]

2. Hearings were held before Administrative Law Judge Chester F. Naumowicz, Jr. between September 13, 1971, and January 5, 1973. In his Initial Decision, FCC 73D-6, released February 14, 1973, Judge Naumowicz ultimately resolved all qualifying issues in favor of the applicants. Under the comparative issues, he preferred IBI's proposal over WIFE's proposal. He, therefore, granted all of the renewal applications except that of WIFE, which he denied; and he granted IBI's application for a construction permit at Indianapolis, Indiana. Further hearing sessions were held pursuant to our remand order, 40 FCC 2d 623 (1973). The Judge then issued a Supplemental Initial Decision, 73D-36, released June 22, 1973, which affirmed his Initial Decision. Exceptions were filed by Star Stations, by IBI and by the Chief, Broadcast Bureau. Briefs in support of the respective positions taken in exceptions were filed by Star Stations and by the Broadcast Bureau. Reply briefs were filed by all parties. Oral argument was then heard before the Commission, *en banc*, on October 15, 1974.

3. It may be observed initially that Star Stations of Indiana, Inc. has never been granted a regular renewal for WIFE or WIFE-FM. Don Burden [4] acquired these stations in 1963 by a voluntary assignment of license, approved by the Commission on November 7, 1963. Several months later, renewal applications became due and were granted for short terms of one year because WIFE had used a partial survey of audience ratings in a misleading fashion in order to improve the station's sales of air time. See *Star Stations of Indiana, Inc.*, adopted October 28, 1964, 3 RR 2d 745.[5] When the next renewal applications were filed, they were designated for hearing in light of conduct which had occurred during that probationary period. After hearings were held, the Commission found that WIFE had conducted contests and billed advertisers in an improper manner and again was un-

[1] Order of the Commission, FCC 70-1256 (corrected), released December 15, 1970; and re-designated under our Order, FCC 72-148, released February 24, 1972. See also Memorandum Opinion and Order, 28 FCC 2d 691 (1971).

[2] Memorandum Opinions and Orders of the Review Board, 28 FCC 2d 488 (1971), and 34 FCC 2d 632 (1972); and of the Commission, 40 FCC 2d 623 (1973).

[3] Of the 20 evidentiary issues specified against Star, Issues No. 2 through 10 call for determinations as to whether, during political campaigns for the U.S. Senate in 1964 and 1966, Star made improper corporate contributions to candidates for Federal office, slanted news broadcasts to deliberately favor one candidate over another candidate, violated Fairness Doctrine obligations during either campaign, made a false Political Broadcast Report for WIFE in 1964, and whether there has been evasion, lack of candor, or misrepresentation, regarding these matters. Issues Nos. 11 and 12 were designated to determine whether KISN planned in 1966 to make payments to local zoning officials to influence their action on KISN's proposed construction of new antenna towers, and whether Star has been evasive, lacking in candor or has misrepresented facts to the Commission concerning the zoning matter. Issue No. 13 was designated to determine the facts and their significance surrounding Star's gifts and favors to the president of an audience survey company, in light of WIFE's misuse of data obtained from his office. Issue No. 19 was designated to determine whether Star's principals or agents have engaged in efforts to coerce, harass or intimidate employees or former employees in order to frustrate or interfere with Commission processes.

[4] Mr. Burden owns 92.3% of the Star Stations, Inc. stock, and is its chairman of the board and president. He is also an officer and director of each of the licensee subsidiaries. He divides his time among the various broadcast operations.

[5] A $2,000 forfeiture was also assessed in 1963 against KISN for its failure to identify that station properly as a Vancouver station rather than as a Portland, Oregon, station. See 3 RR 2d at 748.

able to make the requisite finding that the pub'ic interest, convenience and necessity would be served by granting the applications for a regular renewal period. These renewal applications were granted for a period of six months. *Star Stations of Indiana, Inc.*, 19 FCC 2d 991 (1969). When renewal applications were next filed, they were designated for hearing in this proceeding. Thus, much of the serious misconduct which has occurred at WIFE took place while Star was on notice, by virtue of the probationary grant of renewals, that its operation would be under close scrutiny by the Commission. The significance of the misconduct established on this record must be viewed against this background. Also, this circumstance must be given substantial weight when the Commission considers the likelihood of future compliance by Star Stations.

4. The record in this proceeding is extensive and complex, filling more than thirty volumes. Although his findings are incomplete, the Judge has correctly found the underlying facts and his findings are adopted except where otherwise indicated in this Decision or in our rulings on exceptions contained in the attached appendix. However, we do not subscribe to the ultimate facts and conclusions or the credibility rulings in the Initial Decision, and our conclusions will thus be substituted for those of the Judge. In reaching his ultimate findings and conclusions, the Judge, we believe, failed to give proper consideration to the circumstances that the Commission has never been able to award Star a full term license renewal for WIFE or WIFE–FM, that a licensee has the burden of proof in a renewal proceeding such as this one, and that the licensees must be held responsible for the misconduct under the circumstances present here. In addition, there are errors of fact and law in the Judge's rulings on the credibility of witnesses which will be discussed below.

5. After careful consideration of the record, we have concluded that the Judge's favorable resolution of the qualifying issues against Star is erroneous. Based on the record before us, we have concluded that Burden was intimately involved in and had knowledge of a range of misconduct including improper campaign contributions, slanted news broadcasts, and misrepresentations to the Commission. In addition, the evidence reflects attempts to frustrate the Commission's processes by intimidating and harassing employees and former employees of Star. We have found that the record demonstrates a reprehensible course of misconduct involving the basic character qualifications of Burden and Star, clearly warranting their disqualification from operating these broadcast facilities. In view of such pervasive misconduct, we have concluded that the public interest, convenience and necessity could not be served by the grant of Star's renewal applications.

6. *Facts Affecting Mercer's Credibility.* To a large degree, we have reached conclusions differing markedly from those of the Initial Decision because we believe that the Judge failed to properly consider and weigh the testimony of former Star Station employees. Therefore, we shall consider, as a preliminary matter, the Judge's rulings on credibility. Ron Mercer was general manager of WIFE from 1963 to 1965. In 1965, he signed an affidavit to the effect that he alone was responsible for certain improprieties in the operation of WIFE dur-

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ing 1964. WIFE submitted the exculpatory affidavit to the Commission. Thereafter, in the 1966 WIFE renewal hearing, at a time when Mercer was no longer employed by Star, he recanted the affidavit, testifying that he had acted under Burden's instructions and was not solely responsible for the misconduct. Burden denied it. In our Decision in 1969, 19 FCC 2d 991, we did not resolve these conflicts, and we do not attempt to do so now. However, in this proceeding, the Judge has ruled that Mercer lied either in his affidavit or in his testimony in 1966, and that this fact affects Mercer's credibility adversely. He also found that, in this proceeding, Mercer expressed the view that signing the false affidavit was somehow less culpable because it was done for a friend, and that this does not inspire confidence in the sanctity with which Mercer regards his oath. He found, in addition, that Mercer lied in this proceeding, falsely attributing to Burden certain harassments during an investigation of Mercer when he knew that one Charles Pitman was responsible for that investigation. The Judge observed that the demeanor of Burden and Mercer reflected hostility, one for the other, and he concluded that, out of malice for Burden, Mercer was willing to bear false witness against Burden. He ruled that Mercer's testimony would not be credited absent firm corroboration.

7. We agree with the Judge that, in assessing the credibility of a witness, it is proper to consider his demeanor, the fact that he may have previously given a knowingly false statement under oath, and the witness's explanation of why he signed a false statement. However, we do not subscribe to the Judge's view as to what the record shows on these matters.

8. Mercer testified in this proceeding that, as part of the 1966 hearing, Star's counsel had characterized him as "an admitted liar" and that counsel's statement had been aired out of context in the news coverage of an Indianapolis television station, without mention of Mercer's explanation. Star's counsel asked Mercer on cross-examination if he did not regard himself as an admitted liar because of the affidavit, and Mercer responded:

> That was done as a personal favor to Don Burden since I worked there and he paid my salary. He asked me to make that statement and I did, and when I found out that he was going to try to blame all his station problems on me, I reneged on it. And I only did it as a favor because he asked me to.

On redirect examination by the Broadcast Bureau's counsel, Mercer acknowledged that signing his name to a false affidavit was improper at the time he did it.

9. In our view, the thrust of Mercer's explanation cannot reasonably be said to be that signing a false affidavit is less culpable when done for a friend. Rather, he admitted that what he had done was wrong, but claimed that the characterization of him as an admitted liar was unfair without reference to the fact of his employment by Burden at the time. It is well settled that the fact of employment is relevant to the weight to be given to an exculpatory statement favorable to an employer. See *Thurber Corp. v. Fairchild Motor Corp.*, 269 F. 2d 841 (CA La., 1959) and *Majestic v. Louisville & N.R. Co.*, 147 F. 2d 621, 627 (6th Cir., 1945). Knowingly signing a false affidavit for any rea-

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son is not to be condoned. We nevertheless are of the opinion that there is nothing in Mercer's testimony which evidences that Mercer does not now regard his oath with sanctity. In context, his denial that he was an admitted liar does not, therefore, constitute a fact adversely affecting his credibility.

10. Nor do we agree that the record establishes that Mercer consciously attributed harassing incidents to Burden which, he knew, were the responsibility of Charles Pitman. Bureau counsel elicited the testimony in question. Counsel asked Mercer "whether or not Station WIFE or any of its officers or employees have done anything to injure you in your [advertising] agency business?" Mercer testified, *inter alia*, that WIFE on several occasions refused to recognize or do business with him as an advertising agency; that Burden ran a full-page ad injuring Mercer's agency business; that anonymous phone calls were made to associates and relatives during a period from August, 1969, to June or July, 1970; and that, when he moved into a new house, cars would drive slowly back and forth, shutting off their lights at night. Finally, Bureau counsel asked Mercer "do you have any knowledge of anyone else who you know who you've had past dealings with, other than Mr. Burden, who would have any reasons to do these things that you've just related?" Mercer responded "None at all."

11. On cross-examination, Star's counsel asked if Mercer knew who the harassing phone calls had come from and if he knew who the drivers of the cars passing in front of his house had been. To each question Mercer responded "No." However, Star's counsel did not ask whether any of these incidents might be attributed to Charles Pitman.[6] Two weeks later, without prior notice to opposing counsel that Pitman was being called to challenge Mercer's credibility, Pitman was called and testified that in July, 1969, Pitman sold his house to Mercer, remaining in possession as a tenant; that Mercer raised the rent and a dispute ensued; that as a result Pitman began a complete investigation of Mercer, involving phone calls to past business associates and a former wife of Mercer, as well as the employment of a private investigator in Portland, Oregon; and that Pitman moved out of the house on January 18, 1970, and terminated his investigation in the latter part of that month when Mercer moved in.

12. The Judge found that Mercer had knowingly attributed the incidents from Pitman's investigation to Burden, and Star's counsel's maintained at oral argument that the incidents "fit like a glove." We cannot agree. Pitman was not the only person who had investigated Mercer; Burden had also. See Findings 119 and 122, I.D. Burden contacted Mercer's ex-wife and one of his former business associates in an effort to obtain adverse information about Mercer; and he struck out at Mercer, attempting to damage him in his business activities. When Pitman confronted Mercer with the fact of his investigation, Mercer responded that he had heard that "there were others investigating him." Moreover, it does not appear that Pitman could have been responsible for the surveillance by cars which Mercer described since Pitman terminated his investigation when he gave possession of his

[6] Star, in challenging Mercer's credibility, had the burden of establishing that his testimony was not believable.

house to Mercer, and since the particular incidents to which Mercer testified did not start until after Mercer moved into the house.

13. Thus, the evidence indicates that whereas both Pitman and Burden investigated Mercer, Pitman's efforts were narrower in nature and time than the actions attributed to Burden. Mercer in his testimony was not asked whether Pitman could have been responsible for any of these incidents. It follows that, while Mercer attributed some incidents to Burden which bear similarities to Pitman's investigation, he clearly was not unreasonable in asserting that Burden was behind the anonymous acts of harassment which he described. Since a direct conflict should not be inferred from such ambiguous testimony, we are not persuaded that Star has shown a sufficient discrepancy between Mercer's and Pitman's testimony to warrant making an adverse finding as to Mercer's credibility.

14. Without so stating, the Judge apparently placed reliance on the maxim, *Falsus in uno, falsus in omnibus*, *i.e.*, he who speaks falsely on one point, will speak falsely upon all, in using the matters set forth above as a basis for rejection all of Mercer's testimony in this proceeding. However, the modern view in civil proceedings is that it would be prejudicial error to instruct a jury to disregard all of the testimony of a witness merely because his credibility has been questioned.[7] Rather, such testimony should be evaluated and accorded the weight to which it is entitled in the light of all of the relevant facts and circumstances in the record, including the demeanor of the witness and any detracting evidence. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 *et seq.* (1950). Thus, instead of treating Mercer's testimony as if it had no independent probative value whatsoever, as the Judge did, we are convinced that all of the evidence, including Mercer's testimony, his hostility toward Burden, and the fact that he recanted his earlier affidavit, should be considered and weighed to determine what conclusions are warranted here.

15. *The 1964 Senatorial Campaign in Indiana.* Regarding WIFE's activities during the 1964 Senatorial campaign in Indiana, Mercer testified that a newspaper printed an article in 1964 on the trouble Burden was having with the FCC because of the misleading use of audience ratings; that on the same morning, Burden told Mercer via long distance that Senator Vance Hartke wanted to help him on his FCC problem if WIFE would give him publicity on each newscast and run some free advertising; and that about ten days later, Burden told Mercer that he had met with Senator Hartke and that the Senator was going to help Burden. According to Mercer, Burden then told Mercer to take "the necessary papers" to the Senator's office or send them by Bob Kiley (who was employed at WIFE) and they would find a "patsy" to sign them. Mercer also stated that he received a telephone call that same morning from Elmar Ruben, of the Ruben Advertising Agency of Indianapolis, who stated that he knew about the arrangement Burden had with the Senator, that one of the Senator's friends would sign the papers, and that Ruben Advertising would do

[7] See 4 ALR 2d 1064 and *Virginia Railway Company v. Armentrout*, 166 F. 2d 400 (4th Cir., 1948). According to *Wigmore on Evidence*, Section 1008, (*Chadbourn rev.* 1970), at page 982, the maxim should be condemned as both worthless and pernicious.

the production work. Mercer said that he sent Kiley with a contract, which Mace Broide, the Senator's administrative assistant, signed; that Burden was not pleased with the signature of one connected with the Senator's campaign appearing on the contract; that Burden called the Senator's office; that Burden was given the name of Edward Lewis; and that a new contract was prepared which Lewis signed on September 21, 1964. Mercer stated that he assured Lewis that he would not be held personally liable under the contract. The contract recited that it was prepaid when it was not. In fact the arrangement according to Mercer's testimony was that no payment was expected to be made, although monthly bills were sent to Senator Hartke's advertising agent.

16. Mercer also testified that, under Burden's instructions, he directed WIFE's News Director, Bill Donnella, to make sure that Senator Hartke received frequent, favorable mention in the station's news broadcasts; and that these instructions were carried out. In sum, it was Mercer's testimony that a scheme to afford the candidate favorable news coverage and to give him free broadcast time under a sham contract was entered into by Burden, and that Mercer carried out the plan under Burden's instructions. Donnella testified that he complained, first to Mercer and then to Steve Brown,[8] that these "highly irregular" instructions were unfair to Hartke's opponent, but that Brown told him to carry out the instructions, although short mentions of the candidate would suffice. Donnella testified that, in October, 1966, he discussed Mercer's instructions to slant the news with Burden; and that Burden then sent him to Washington for a discussion with counsel regarding the matter, which lasted one or two hours.[9]

17. In his testimony, Burden denied personal knowledge of any instructions to favor the Senator in WIFE's newscasts, or of the September 21, 1964, contract prior to May of 1965, when Mercer discussed with him the possibility of writing off the sum called for under the contract as a bad debt. Burden claimed that he immediately concurred in the write-off, because he did not regard it as wise for a businessman holding a license from a federal agency to press vigorously for collection of a debt from a U.S. Senator. Burden also asserted that he did not inquire or investigate what efforts had been made to collect the debt and that his participation in the write-off decision was *pro forma*. Star thus maintains that Mercer duped Burden and that Mercer on his own undertook to furnish the Senator favorable news coverage and free advertising without Burden's knowledge or consent.

18. Edward Lewis in his testimony conceded that he signed the September 21, 1964, contract, and an accompanying statement (the "Agreement Form for Political Broadcasts") to the effect that the broadcasts called for under contract were prepaid, which was false.

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[8] Steve Brown is a 1% stockholder in Star Stations, Inc. and holds top-level executive positions. In 1964, Brown was *Star's National Program Director* and, as one of Burden's principal lieutenants, he spoke with Burden's authority to Star's personnel. Brown, in his testimony, recalled only that he had reviewed newscast policy with Donnella, instructing him to keep broadcasts within allotted time periods.

[9] Burden had clearly gained knowledge of these instructions to slant WIFE's news at least by October, 1966, but he denied such knowledge under oath on three subsequent occasions: (a) in 1969 when the Commission's investigators interviewed Burden; (b) in May, 1970, when Burden testified in the non-public investigatory proceeding; and (c) in testimony in this proceeding.

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Lewis testified that he did not recall discussing payment with Kiley or Mercer and that he assumed that payment would be taken care of by one of the Hartke campaign committees. The September 21, 1964, contract differed from four others which WIFE entered into with the Senator's campaign committee at that time. The other four were prepaid; the September 21 contract was not prepaid although it recited that it was. The other four contracts were signed by Donald Love, the media buyer handling the Senator's account on behalf of the Ruben Advertising Agency, whereas the September 21 contract was signed by Edward Lewis, for the "Senator Hartke Democratic Campaign Committee". In fact, no such committee existed by that name, Lewis held no office in any Hartke Campaign Committee during the campaign, and signing this contract was Lewis's only political activity during the 1964 campaign.

19. The broadcasts called for under the September 21, 1964, contract began immediately and continued as specified in the contract, *i.e.*, 310 sixty-second spots to be run for 44 days (50 spots per week) at a cost of $19 per spot totalling $5,890. Each month, the Ruben Advertising Agency was billed by WIFE but the agency did not respond until eight months later when WIFE's auditors wrote regarding the overdue bill. The Ruben Advertising Agency replied in May, 1965, denying that it had placed the order for the spots. Mercer discussed a write-off with Burden; and the charges were written off. No further attempt was made to collect the bill, and Senator Hartke's office was not queried regarding the nonpayment.[10]

20. Further evidence on this matter was provided by Mrs. Dorothy Storz, who was Star Stations, Inc.'s bookkeeper, and the secretary-treasurer of all four licensees. She testified that, as part of her duties, she prepared a monthly cash statement for each of Star's stations; that, in October of 1964, Burden instructed her to prepare a second cash statement for WIFE deleting any projected income from the Hartke spots; and that Burden later ordered her to retrieve all copies of the second statement and to destroy them. Star's counsel asked Mrs. Storz why Burden would direct her to prepare a document which could be so incriminating. She stated that it could possibly serve to calculate Mercer's commission or to reflect projected income for WIFE, without regard to the Hartke spots. However, Star showed that, according to WIFE's books, Mercer had been paid a commission on these spots at the time, which was debited after the write-off in May, 1965. Star also maintained that Burden would have been capable of mentally computing the income for WIFE by subtracting $6,000 from the cash statement which had already been prepared for the month. On this basis, the Judge ruled that Mrs. Storz's recall of past events was not sufficiently clear to give credence to any of this testimony, which was uncorroborated, and he rejected any corroborative effect which this evidence might give Mercer's testimony.

21. As the Judge found, several of the foregoing facts cannot be satisfactorily explained unless Burden knew of the scheme in advance,

[10] In 1965, the $5,890 receivable was written off as a $4,058 debit. The difference is unexplained on the record. In December of 1969, Senator Hartke's office requested a bill. WIFE's billing of $3,265 covered only spots which could then be verified from WIFE's records which were no longer complete. In May of 1970, Star was paid $3,265.

Burden denies knowing of the contract in question until May of 1965 when discussion arose as to whether to write it off as a bad debt. He suggests that his participation in the write-off decision was *pro forma* without any real consideration of the facts in the case or any investigation of the efforts theretofore made to collect.

22. If this were true, Burden's actions in this instance would be entirely uncharacteristic of what Star claims to be his ordinary performance. Star has introduced evidence directed to the comparative issue demonstrating that Burden participates very actively in the management of all of the Star stations. He visits them all frequently; he telephones often; and he demands regular, detailed reports. He participates in all of the significant decisions made at all of his stations. It is difficult to believe now, as Mercer would have found it difficult to assume then, that a $6,000 receivable would be written off without Burden's close scrutiny.

23. Yet, that is, in fact, what Mercer would have to assume if he had actually entered into the Lewis contract without Burden's consent. He would have to assume that Burden would never ask him why the contract referred to advance payment when no such payment was made. He would have to assume Burden would never contact Lewis and whomever Lewis would say authorized him to sign the contract. He would have to assume that Burden would never contact Senator Hartke, although Mercer knew the two were acquainted, to inquire why the Senator's committees didn't pay their bills. Absent these assumptions, Mercer would have to believe that Burden was certain to discover that Mercer had entered into a deal contrary to law which inevitably could and did place the station's license in gravest jeopardy. In short, the circumstances surrounding Mercer's actions are incomprehensible unless Mercer was acting with Burden's consent.

24. Nor is it easy to understand Burden's actions when the Ruben Advertising Agency disclaimed the bill for the Hartke spots. Accepting, *arguendo*, Burden's claim that he did not regard it as wise for a businessman holding a license from a federal agency to press vigorously for collection of a debt from a United States Senator, his total inaction is not thereby explained. When the Ruben agency disclaimed the bill, he could not truly have believed that he might be suspected of harassing Senator Hartke if he made inquiries of Lewis or even if he sought an explanation from the Senator himself. His immediate concurrence with Mercer's decision to write off so large a receivable without even contacting Senator Hartke's office or endeavoring to ascertain why Ruben refused to acknowledge the debt strongly implies that he had not intended to collect the account in the first place.

25. Moreover, WIFE's relations with the Ruben Advertising Agency on this account appear to have been somewhat irregular. Accepting the fact that Ruben was being billed regularly each month,[11] it follows that between October, 1964, and May, 1965, WIFE was confronted with the fact that a substantial bill was simply being ignored by the

[11] Mr. Elmar Ruben testified that he never saw the bills, although all bills to the agency were supposed to cross his desk. However, this testimony does not warrant a finding that the bills were not sent. Everyone connected with WIFE who testified on the matter claimed to either know or have reason to believe that the bills were sent, and the fact that Mr. Ruben did not see the bills does not preclude the possibility that they were received at his agency.

agency. It is difficult to believe that nothing would be done about such a situation. Advertising agencies depend for their very existence on credit with media outlets. It is improbable that WIFE would have permitted the situation to continue for eight months without even inquiring why the bill was not being paid. In view of Burden's insistence on frequent and detailed financial reports from his stations, it is difficult to understand why he would not demand an explanation prior to May of 1965.

26. It is also found that Donnella's memory is inherently more credible than Steve Brown's with regard to the slanting of news coverage. As professional newsmen, Donnella and his subordinates must have chafed under what they could only regard as orders to perform their duties in an unprofessional manner. It is wholly natural that he would have complained to Mercer, and, when that proved fruitless, avail himself of the opportunity created by Brown's presence to carry that complaint higher. Indeed, it would have been surprising had he failed to do so.

27. Brown's failure to act on the complaint gives rise to certain inferences. He could not have failed to recognize that what Donnella complained of was highly irregular. His refusal to take immediate corrective action may well be attributable to a realization that Mercer was acting within the scope of instructions received from higher authority, and no one at Star possessed such authority other than Burden. In any event, it is found that the record establishes by credible testimony that Mercer's instructions to the news staff were contemporaneously known in Star's higher chain of command, and that immediate action to countermand those instructions was not taken.[12]

28. In light of Mercer's recanted affidavit and his hostile demeanor toward Burden, his testimony has not been accepted uncritically. However, Mercer's testimony comports with other circumstantial and testimonial evidence of record, as set forth above and Burden's denials of involvement in the scheme do not. Moreover, there is further support for Mercer's testimony in other aspects of the record. For example, the Judge asserted that Mercer's allegation that Burden had a motivation to curry favor with Senator Hartke lacks plausibility because no newspaper article concerning the investigation of WIFE was shown to exist and because the Commission did not act on that investigation of WIFE until October 28, 1964, after the contract had been signed. However, the Commission's October 28, 1964, action, as set forth at 3 RR 2d 745, states explicitly that the licensee had been informed of the investigation of WIFE on July 29, 1964, and that the licensee had submitted its response to the Commission's inquiries on September 11, 1964. Thus, it is clear that Burden was aware of the Commission's investigation prior to the time the contract was signed and that he had a very plausible motive to curry favor with the Senator.

29. There is also corroboration for Mercer's testimony, that Burden was privy to the scheme, in the testimony of Mrs. Storz. See para-

[12] Paragraphs 21 through 27, *supra*, are substantially similar to findings made by the Judge in the Initial Decision. While the Judge dismissed these findings as creating only "suspicion" concerning Burden's role in this affair, they reflect facts and circumstances which must be considered and weighed in determining what conclusions are warranted in this proceeding.

graph 20, *supra*. A careful reading of her testimony shows that she had a clear and unambiguous recollection of the preparation and the later destruction of the cash statement excluding revenue from the September 21 contract, and her recollection was in no way diminished or altered on cross-examination. The only reservation about her testimony arises from the fact that her speculation about the reason why the cash statement was prepared may not have been accurate, but this phase of her testimony is not germane to and certainly does not undermine the credibilty of her specific affirmative testimony about the special cash statement.

30. Thus, on the basis of the entire record we are convinced that Burden was privy to a scheme which involved a sham contract to cover up the fact that free time was being given to a candidate for political office in conflict with the U.S. Criminal Code, Title 18, Section 610; that the scheme included the slanting of WIFE's news to provide favorable coverage for the candidate; that Mercer carried out the scheme under Burden's instructions, improperly providing publicity to the candidate on regular newscasts and broadcasting free spots on behalf of the Senator's candidacy for 44 days; that Burden signed and submitted to the Commission a questionnaire, "A Survey of Political Broadcasting in the Primary and General Election Campaign of 1964," representing that no free broadcast time had been provided for any candidate, which was not true; and that Burden made misrepresentations concerning his knowledge in an affidavit dated January 14, 1967, in an official interview on December 3, 1969, in the 1970 non-public proceeding involving these matters, and in this hearing.

31. *Similar Misconduct at KISN.* In 1966, Burden undertook a course of conduct involving the broadcast activities of KISN at Vancouver, Washington, similar to that found at WIFE in 1964, but with a different motive. Burden had a personal preference for Governor Mark Hatfield over Representative Robert Duncan, his opponent in the Oregon race for the United States Senate. In May 1966, Star contributed $1,000 to Hatfield's campaign in conflict with 18 U.S. Code, Section 610, prohibiting corporate gifts to federal candidates.[13] Burden also endeavored to provide one-sided coverage of the campaign, and on September 22, 1966, he and Steve Brown called together the following members of KISN's staff: Station Manager—Steve Shepard; News Director—Duane Coker; Program Director—Paul Barr; and Disc Jockeys—Don Kennedy and Paul Oscar Anderson.[14]

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[13] Burden directed Mrs. Storz to cash a check for ten $100 bills, to place them in an envelope, and to mail them to Governor Hatfield's office. Although the record is in conflict and it cannot be determined whether the money was received, the preponderance of the evidence establishes convincingly that it was *sent* on Burden's instructions. Star's corporate books reflect this outgoing sum; the entries indicate that it represented a political contribution; and the last entry, charging "Don Burden contributions . . .," does not alter the *corporate nature of the gift. This bookkeeping change was made within days* of receiving advice from counsel as to the provisions of 18 U.S. Code Sec. 610. In the light of all of the evidence, we find unconvincing Burden's claim that he had sought counsel's advice as to whether he could make a gift to both candidates. Further, Star's suggestion that Mrs. Storz may have misappropriated the funds to her own use is rejected. Mrs. Storz's work was reviewed by Burden and by Star's auditors. It is not credible that such an expenditure could have been recorded as it was without Burden's knowledge and consent.

[14] Don Kennedy's real name is Lanny Jess Wynia; Paul Anderson's real name is Paul E. Brown. Since they have been called by the names which they used on the air as disc jockeys in the Initial Decision, we have followed that practice here.

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32. The KISN staff was given instructions as follows: Kennedy was relieved of his normal duties and instructed to accompany Governor Hatfield on his campaign, and to phone in stories on the campaign several times each day; Anderson was instructed to cover Kennedy's air shift as well as his own; and Kennedy, Barr, Coker and Anita Pope (KISN's Copy Director) were instructed to prepare promotional announcements to publicize the station's intention to cover Governor Hatfield's campaign. Burden announced that his purpose was to put Mark Hatfield in the U.S. Senate and that only positive news items regarding Governor Hatfield and negative stories concerning Representative Duncan were to be carried.[15]

33. On the night of September 22, 1966, promotional announcements of KISN's upcoming coverage of Governor Hatfield's campaign commenced. On September 23, Shepard called Jack Clenaghen, who was handling the advertising for Congressman Duncan's campaign, and stated that KISN planned equal coverage of the two candidates' campaigns. On September 24, Kennedy commenced his coverage of Governor Hatfield, calling in stories approximately three times a day, usually including "actualities" of Hatfield's voice. Between September 22 and 28, over 100 promotions were broadcast. Shepard ordered them terminated because he calculated that they had sufficient exposure to do their job of publicizing the station's programming objectives. Between September 24 and October 3, KISN aired approximately 200 newscasts which included some 65–75 of Kennedy's stories about Governor Hatfield. Shepard cancelled them on October 3 because by then Anderson had made charges to the FCC of unfairness in KISN's coverage of the campaign; the charges had been made public in Oregon; and he feared that the news coverage lent credence to Anderson's charges.[16]

34. During the period September 24–October 3, Congressman Duncan made three appearances in Oregon, attending to his Congressional duties on weekdays in Washington, D.C. KISN carried at the most 43 "mentions" of Duncan during this period, announcing that Vice President Humphrey would campaign in Duncan's behalf, that a speech by Duncan had been cancelled, that Duncan was endorsed by the Oregon Journal, and other matters of this genre, nowhere giving Congressman Duncan's viewpoint on the issues of the campaign.

35. Don Burden denied making the $1,000 gift to Governor Hatfield

[15] This finding is based upon testimony of Paul Anderson which the Judge rejected on the grounds that Anderson may have been motivated, at least in part, by self-interest, in that he "bettered himself professionally" by leaving KISN to work for a rival station, KGAR. The evidence, however, does not establish that there was any reasonable likelihood that Anderson would earn more at KGAR, where he was promised $600 per month plus 5% of the weekly gross over $2500. At KISN, Anderson had earned $215 a week or over $930 per month. Only if KGAR's gross income exceeded $197,000 annually would he have "bettered himself" at KGAR, and Star, which had the burden of proof in this renewal proceeding, made no showing that such revenues would be generated by this type of station. In addition, Star argued at oral argument that Anderson's testimony should not be given credence because he bore hostility toward KISN for seeking (and obtaining) a restraining order against him, which prevented him from working for KGAR. We reject this contention also. Anderson first contacted KGAR on September 24, and left KISN on September 26. He was not served with the restraining order until September 30 after he had written a letter regarding the misconduct at KISN, which the Commission received on September 28.

[16] When several people called Clenaghen asserting that the candidates were not receiving equal treatment, Clenaghen monitored KISN for some 2¼ hours on the afternoon of September 28, and his secretary monitored the station intermittently on September 29. He then called Shepard to complain that the coverage was contrary to the understanding which Shepard had given him on September 23. Nonetheless, the special news coverage of Governor Hatfield continued until October 3 when it stopped for other reasons.

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and denied any intention to provide unbalanced coverage of the campaign.[17] However, the weight of probative evidence is to the contrary. We conclude that Burden made an improper corporate gift to Governor Hatfield; instructed KISN's staff to use newscasts to favor one candidate over the other during the campaign; misrepresented the facts; and evidenced lack of candor.

36. In both the 1964 and 1966 campaigns, newscasts were used as a vehicle to publicize Burden's preferred candidate—not as an exercise of news judgment, but as a deception of the public and to further his private interests. Criminal provisions of Federal statutes governing corporate gifts to candidates were disregarded. Such attempts to use broadcast facilities to subvert the political process cannot be ignored or condoned.

37. *Other Matters.* When employees having knowledge of this misconduct have left the parent company or the staffs of WIFE and KISN, they have been pursued in their personal lives and employment, in order that Burden might determine what they have said or would say to Commission investigators and seek revenge where the comments have been adverse. For example, Steve Shepard sought out Hal Heubner, a former KISN salesman, after he left KISN. When Shepard became convinced that Heubner had adverse facts to recount, in retaliation, he called Heubner's employer and attempted to convey to him that Heubner was disloyal to employers in the hope that Heubner would be adversely affected. At WIFE, a concerted effort was made to harm Mercer in earning a livelihood as an advertising agent and in his business reputation after he left the station. See paragraphs 10 and 12, *supra.* Kiley refused to permit Commission investigators to question WIFE employees in 1969 until they had been offered and accepted the assistance of *Star's* counsel. During the 1966 WIFE hearing, Burden sought and obtained, from a hotel switchboard operator, the long distance number a former employee and witness had called in Omaha.[18] Burden also made elaborate, but unsuccessful, attempts to tape record the conversation of that same former employee concerning her statement to Commission investigators. In sum, Star's principals and employees have demonstrated a pattern of conduct which we find reprehensible, which bears on the question of the licensees' likely future conduct, and which must be considered in the ultimate determination in this proceeding. *Cf., Chronicle Broadcasting Co.* (*KRON–FM and KRON–TV*), 40 FCC 2d 775, at 801 (1973).

38. The instances of misconduct which have been found in the preceding paragraphs of this Decision have overriding significance in assessing the licensees' qualifications, but they should not be allowed to overshadow completely the fact that other misconduct has been proved which also has decisional significance. In this connection, the renewal applications of WIFE and WIFE–FM were designated for

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[17] Star maintains that there is no substantial evidence that, if KISN's coverage of the campaign had not been interrupted by Anderson's charges of unfairness in news coverage, such coverage ultimately would have been unequal, since Star could not have predicted whether Congressman Duncan would have continued to come to Oregon only on weekends. This, of course, ignores the evidence that Burden deliberately tailored the coverage to prefer his own candidate, and the absence of any evidence that the station attempted to give Duncan's viewpoint on the issues of the campaign.

[18] While Star maintains that this was a legitimate investigative technique, it is not an isolated occurrence and in the context of these attempts to inhibit the Commission's investigative and adjudicatory processes, it does not reflect favorably on the licensees.

hearing on April 28, 1966, 3 FCC 2d 575, under issues concerning contest improprieties, and Star was thus given notice that its manner of conducting contests was under consideration and would be investigated in the hearing. Nevertheless, the safeguards to protect the public from fraud in contests continued to be inadequate at Star's stations and at Station WPDQ in Jacksonville, Florida, whose owner was being counseled by Burden on how to conduct promotional contests.

39. During the period, 1966–1968, Star's stations conducted four contests in which its practices were not adequate to insure that no abuse would occur, and in at least two of those contests, WIFE's $1,000 Mystery Melody Contest and KOIL's Black Box Contest, actual misconduct did take place. Moreover, four contests conducted at WPDQ in 1967 under Burden's advice did not include adequate precautionary measures to prevent misconduct, and such abuses did occur (see 28 FCC 2d 126 and 227, and 42 FCC 2d 844). While the misconduct involved only a few of the many contests broadcast, and while the irregularities were initially reported by the licensees, Burden's continued derelictions in conducting promotional contests, after being placed on notice that such matters would be inquired into and that the stations would be held responsible for any misconduct, are a serious reflection on his ability and willingness to protect the public from these irregularities.

40. The record also establishes that, in the fall of 1964, when KISN undertook to move its transmitter site, it obtained approval of the site change from the FAA and the FCC, but was unable to obtain zoning authorization from Multnomah County. Early in 1966, Burden formed the opinion that matters might be expedited if he were to make a political contribution to members of the zoning authority, and he obtained the approval of minority stockholders to do so. Burden directed Mrs. Storz to draw $10,000 from Star's account in Omaha and send it to him in cash, which she did in March, 1966. However, before Burden did anything with the money, zoning approval was granted, and Burden distributed the $10,000 as a special dividend. In our view, the evidence under Issues Nos. 11 and 12 supports conclusions that Don Burden undertook a scheme to attempt to influence the action of local officials on KISN's rezoning proposal by contributing $10,000 to their campaign funds; and that he took overt steps to complete this scheme although he did not carry it to completion because of the fortuitous circumstance that favorable action on the request was taken before the contributions were made.

41. The record further establishes that Burden gave a number of gifts and favors to Frank Stisser, then president of a broadcast rating service; that in September of 1965, Burden gave Stisser a $444.20 yard tractor (obtained by Star under a "tradeout" arrangement with an advertiser); that, in 1966 and 1967, Stisser and his party stayed in a Las Vegas hotel and charged expenses to Star's account (again, obtained through a tradeout arrangement); that Burden and Stisser had been friends for 20 years, visiting each others homes and vacationing together; and that Burden testified that he regarded these gifts as tokens of personal esteem, unrelated to any special treatment given Star. The testimony must be viewed in the light of other facts, however, which establish that in 1963 Burden obtained data out of Stisser's office which his company would not ordinarily release because it was

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incomplete and subject to misuse by a station. Although the gifts in question were made after the release of the survey data, there is still a serious implication that the making of gifts of this size and consequence was inappropriate for a licensee under these circumstances.

42. While these further deviations from the standard of conduct which the Commission demands of its licensees may not be disqualifying in and of themselves, they are significant and they form part of a pattern of misconduct which demonstrates that Burden and Star cannot, or will not, assume and discharge the minimal obligations of a Commission licensee. On the basis of the entire record, we are convinced that misconduct has been shown here which is more serious than that involved in *Nick J. Chaconas*, 28 FCC 2d 231 (1971), reconsideration denied, 35 FCC 2d 698 (1972), affirmed, 486 F. 2d 1314 (CA DC 1973), where the application for renewal of license was denied. Nor do we find here any more evidence of future compliance with the public interest standard requisite to satisfy the minimal qualifications for renewal than could be gleaned from the record in *Chaconas*. In view of the pervasive and continuing misconduct demonstrated in Burden's operation of his stations, it is clear that Star and Burden lack the requisite qualifications to be licensees of this Commission and that the evidence of record requires the denial of each of Star's renewal applications in this proceeding.

43. As appears in our rulings on exceptions, we are of the opinion that Indianapolis Broadcasting, Inc. has demonstrated that it possesses the requisite qualifications to be a Commission licensee; and we conclude that the grant of its application will serve the public interest, convenience and necessity.

44. Accordingly, IT IS ORDERED:

(a) That the applications of Star Stations of Indiana, Inc. for renewal of the licenses of Stations WIFE and WIFE-FM at Indianapolis, Indiana (File Nos. BR-1144 and BRH-1276), ARE DENIED;

(b) That the applications of Central States Broadcasting, Inc. for renewal of the licenses of Stations KOIL and KOIL-FM at Omaha, Nebraska (File Nos. BR-516 and BRH-992) ARE DENIED;

(c) That the application of Star Broadcasting, Inc. for renewal of the license of Station KISN at Vancouver, Washington (File No. BR-1027), IS DENIED; and

(d) That Star Stations of Indiana, Inc., Central States Broadcasting, Inc. and Star Broadcasting, Inc. ARE AUTHORIZED to continue to operate their stations until 12:01 a.m. on May 1, 1975 to enable the licensees to conclude the stations' affairs; provided, however, that if the licensees seek timely judicial review of this decision, they are authorized to continue the respective operations until thirty (30) days after the final disposition of that appeal.

45. IT IS FURTHER ORDERED, That the application of Indianapolis Broadcasting, Inc. for a construction permit for a standard broadcast station at Indianapolis, Indiana (File No. BP-18706), IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

RULINGS ON EXCEPTIONS OF THE CHIEF, BROADCAST BUREAU, TO THE INITIAL DECISION

Exception No.	*Ruling*
1, 3–4, 25, 33–34, 53, 63–69, 71, 73–77, 80, 81, 83, 88–90, and 92–98.	Granted in substance, as indicated in the Decision.
2	Granted in part to the extent indicated in our rulings on the Broadcast Bureau's exceptions to the Initial Decision in *Belk Broadcasting Co. of Florida, Inc.*, 42 FCC 2d 844 at 850, and otherwise denied.
5–9, 28–32, and 35–42.	Granted. In pars. 15–30 of the Decision we have discussed the evidence of Burden's involvement in the sham contract with WIFE which provided for the broadcast of 310 announcements favoring the candidacy of Senator Hartke without any expectation of payment, of Burden's involvement in the misuse of newscasts to favor Senator Hartke's candidacy, and of Burden's candor with regard to these matters. Although we have not included in all instances the further findings here proposed by the Bureau, we have concluded that they are well-founded, decisionally significant, and supported by the weight of the evidence. Thus, the exceptions are meritorious and the Initial Decision is augmented and modified accordingly as if fully set forth herein.
10	Granted. See par. 28 of the Decision.
11–17, 72, and 79	Granted. See pars. 5–14 of the Decision.
18–20, 26, and 27	Granted in part to the extent indicated in pars. 6–30 in the Decision and otherwise denied for lack of decisional significance.
21–24	Granted in substance. See pars. 20 and 29 of the Decision.
43, 59–60, and 82	Denied. The Broadcast Bureau has not demonstrated that the Administrative Law Judge's findings and conclusions are improper.
44–52, 54–56, 62, 84–85, and 87.	Granted. The Bureau's exceptions to the findings and conclusions relating to the 1966 senatorial campaign in Oregon are meritorious, and the Initial Decision is augmented and modified accordingly as if fully set forth herein. With regard to Exception No. 85, as it relates to conclusions 191–192, see our ruling on the Bureau's Exception No. 78, infra.
57–58, 61, and 86	Granted in substance. See footnote 13 of the Decision.
70	Granted in part. See our ruling on Exception Nos. 63–69, supra. However, the penultimate sentence lacks adequate support in the record, and it is denied.
78	Granted. The record establishes that Don Burden intended to inform the electorate of only one side of the issues in the senatorial campaigns in Indiana in 1964 and in Oregon in 1966, and thus to violate the primer on the applicability of the *Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 FCC 598 (1964)*; and that his instructions were implemented. It was incumbent upon Star to rebut the evidence of such one-sided coverage, *D & E Broadcasting Co.*, 1 FCC 2d 78, 80 (1965); and this Star has not done.

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Exception No.	*Ruling*
91	Granted. The time buyer purchased broadcast time for resale to others and KOIL should have filed copies of the contracts with the Commission under section 1.613(c) of the rules. The facts that the buyer's primary activities were other than time brokering and that its members were, to a large degree, the secondary buyers do not create an exemption from the filing requirement.

RULINGS ON EXCEPTIONS OF INDIANAPOLIS BROADCASTING, INC., TO THE INITIAL AND SUPPLEMENTAL INITIAL DECISIONS AND OTHER MATTERS

Exception No.	*Ruling*
1, 7, and 8	Denied. The matters excepted to are of no decisional significance.
2	Denied. IBI misconceives the nature of the Commission's reporting requirements for contingent liabilities.
3, 4, 9, and 10	Granted in substance. See our ruling on the Broadcast Bureau's Exception Nos. 3–4 and 96–97, and the Decision herein.
5	Granted in part to the extent indicated in the Decision and otherwise denied.
6	Denied. In light of the pervasive evidence of misconduct in this record and our holding in *KFPW Broadcasting Co.*, 40 FCC 2d 126 (1973), Issue No. 25 is moot.
11	Denied. The Review Board's order is correct.

RULINGS ON EXCEPTIONS OF STAR STATIONS OF INDIANA, INC., CENTRAL STATES BROADCASTING, INC., AND STAR BROADCASTING, INC., TO THE INITIAL DECISION AND SUPPLEMENTAL INITIAL DECISION AND TO OTHER MATTERS

Exception No.	*Ruling*
1	Denied. The Administrative Law Judge did not exceed his discretionary authority and prejudicial error has not been established.
2–10, 12–18, 20–27, 29–30, and 68.	Denied. We find no reversible error in the Judge's rulings on the requests for issuance of subpenas, discovery, requests for production of documents, or the admission and exclusion of evidence. Star's contentions based upon section 1.362 of the rules and the Jencks Act [18 United States Code, sec. 3500] are specifically rejected for the reasons set forth in the Bureau's reply brief.
11–11A and 19	Denied. Star has not shown error in the exclusion from the record of testimony intended to show Mrs. Dorothy Storz' bias toward Don Burden based upon the past relationship between them because, as the Judge stated, the matter was entirely collateral without any proper foundation having been laid. We also agree with the Bureau that the exclusionary ruling was not erroneous, since Mrs. Storz continued for a considerable period of time as an employee of Star stations and testified in Burden's behalf during the 1966 WIFE renewal hearing after the alleged relationship was terminated, and since no reason was forthcoming which would account for bias suddenly arising affecting her testimony in this proceeding.
28, 37–39, 48–50, 62–65, and 67.	Denied. The comparative issue has been mooted by our determination that the renewal applicants lack the qualifications to be licensees of this Commission. With regard to the meritorious programing issue (No. 25), see our ruling on IBI's Exception No. 6, to the effect that Issue No. 25 is moot.

Exception No.	*Ruling*
31	Denied. Star concedes that Ron Mercer and Senator Hartke were of different political parties and had not met prior to the spring of 1965. Star's contentions as to the relevance of facts which occurred in the spring of 1965 to the September 21, 1964, contract are too strained to be given credence, in the light of the more substantial evidence to the contrary which is set forth in the Decision.
32–36 and 66	Denied for the reasons set forth in the Decision.
40–47 and 51–61	Denied. While we are of the opinion that comparative demerits would redound to IBI with regard to Mr. Murray Feiwell's lack of judgment and indiscretion in conversation with Bureau counsel, IBI's tardiness in disclosing to the Commission Mr. Jerry Kunkel's stock-for-services arrangement and IBI's plan to seek certain tax benefits, the failure of IBI's principals to timely report changes in their balance sheet assets listed in documents filed with the Commission, and the principals' initial failure to report contingent liabilities, the comparative issue is mooted in this proceeding and these matters neither singly nor in combination are of such seriousness as to justify a conclusion that IBI does not possess the character qualifications to be a licensee. IBI's financial qualifications are to be judged on the basis of the whole record. See *East St. Louis Broadcasting Co.*, 31 FCC 2d 1074 (1971). IBI's current financial proposal is adequate to establish its financial qualifications.

DISSENTING STATEMENT OF COMMISSIONER ROBERT E. LEE

I dissent to the Commission's action today in which the majority denied the renewal applications of Star Stations of Indiana, Inc., Central States Broadcasting, Inc., Indiana; KOIL and KOIL–FM, Omaha, Nebraska; and KJSN, Vancouver, Washington. This is an unprecedented example of an overdose of justice.

The Commission should not have, in my opinion, reversed the findings and conclusions of an experienced Administrative Law Judge, Chester F. Naumowicz, Jr., which were reflected in his Initial Decision, 73D–6, released February 14, 1973, and Supplemental Initial Decision, 73D–36, released June 22, 1973. The Judge after evaluating all the evidence and particularly the credibility of the witnesses found that something less than the "death sentence" for the licensee was called for—I support this decision.

By the Commission's action today, we are effectively bankrupting the licensee and probably denying him a livelihood in his field of expertise.

CONCURRING STATEMENT OF COMMISSIONER JAMES H. QUELLO

(Dockets Nos. 19122 through 19125)

I consider this action to be harsh in the extreme. To impose the "death sentence" upon all broadcast properties operated by this licensee is the ultimate sanction which we can impose. I would welcome a resolution of this matter which did not carry with it the finality of this action. A search of the record for mitigating circumstances, however, fails to turn up convincing evidence that any course short of the action

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we have taken could reasonably be expected to ultimately serve the public interest.

If, in spite of the findings in this case, there were indications of simple error or isolated lapses in judgment to which we are all subject at times, I could not assent to this. The record, to the contrary, shows patterns of misconduct over a considerable period of time which justify the conclusion reached by a majority of the Commission.

Therefore, I reluctantly concur.

109-029—75——8

APPENDIX 3

[NOT TO BE PUBLISHED–SEE LOCAL RULE 8(b).]

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1203 September Term, 1975
Star Broadcasting, Inc., Appellant
v.

Federal Communications Commission, Appellee
Indianapolis Broadcasting, Inc., Intervenor

No. 75-1204
Central States Broadcasting, Inc., Appellant
v.

Federal Communications Commission, Appellee
Indianapolis Broadcasting, Inc., Intervenor

No. 75-1205
Star Stations of Indiana, Inc., Appellant
v.

Federal Communications Commission, Appellee
Indianapolis Broadcasting, Inc., Intervenor

APPEALS FROM THE FEDERAL COMMUNICATIONS COMMISSION

Before: McGowan, Tamm and Robb, Circuit Judges

[Filed December 11, 1975]

JUDGMENT

These causes came on to be heard on petitioner's notice of appeal from an order of the Federal Communications Commission and were argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c). On consideration of the foregoing, it is

ORDER AND ADJUDGED by this Court that the order of the Federal Communications Commission on appeal herein is hereby affirmed. We find no basis in the record for disturbing the decision of the Federal Communications Commission released February 7, 1975, 51 F.C.C.2d 95 (1975).

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1203 **September Term, 1975**

Star Broadcasting, Inc., Appellant

v.

Federal Communications Commission, Appellee
Indianapolis Broadcasting, Inc.

No. 75-1204
Central States Broadcasting, Inc., Appellant

v.

Federal Communications Commission, Appellee
Indianapolis Broadcasting, Inc.

No. 75-1205
Star Stations of Indiana, Inc., Appellant

v.

Federal Communications Commission, Appellee
Indianapolis Broadcasting, Inc.,

Before: McGowan, Tamm and Robb, Circuit Judges.

ORDER

On consideration of appellants' petition for remand or in the alternative petition for rehearing and of the addendum filed with respect thereto, it is

[Filed January 20, 1976]

ORDERED by the Court that appellants' aforesaid petitions are denied.

Per Curiam

For the Court:

/s/ ROBERT A. BONNER
Robert A. Bonner
Clerk

[Received January 21, 1976]

Law Offices Cohn and Marks

APPENDIX 4

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 75D-63

In the Matter of	:	
the Renewal Application of	:	
JOHN MIHOEVICH	:	**DOCKET NO.**
880 Adams Avenue	:	**20415**
Livermore, California 94550	:	
For Amateur Radio Station and Technician Class (C) Operator Licenses.	:	

Appearances

Franklin Halasz, on behalf of John Mihoevich; and *Stuart Chrion* and *Fred W. Vacca*, on behalf of the Safety and Special Radio Services Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE JOHN H. CONLIN
Issued November 19, 1975; Released November 25, 1975

Preliminary Statement

1. By order released April 2, 1975, the Safety and Special Radio Services Bureau, pursuant to delegated authority, designated the above-captioned application, filed February 22, 1974, for hearing on the following issues:

(a) To determine all the facts and circumstances surrounding the filing by John Mihoevich of a renewal application for Amateur radio station and operator licenses.

(b) To determine whether the applicant has misrepresented material facts to the Commission.

(c) To determine, in light of facts adduced under issues (a) and (b), whether the applicant posesses the requisite qualifications to be a licensee of the Commission.

(d) To determine, in light of the foregoing issue, whether the public interest, convenience and necessity would be served by a grant of the renewal application for Technician Class (C) Amateur operator and radio station licenses.

2. The prehearing conference and hearing were held in San Francisco on June 5, 1975, and the record was closed on June 23, 1975. By August 20, 1975 proposed findings and conclusions and replies thereto were filed by the Bureau and the applicant.

Findings of Basic Fact

3. *Applicable Regulations.* At the outset a brief description of certain licensing regulations pertinent to this case seems appropriate. Section 97.29 of the Commission's rules provides that with certain exceptions operator examinations in the Amateur Radio Service may be taken by mail. The rule specifies the manner in which such examinations are to be conducted, providing among other things that they will be taken under the supervision of a volunteer examiner who must meet certain qualifications. A license obtained through an examination taken by mail bears the notation "(C)" after

the appropriate class designation. Thus, for example, a Technician Class license issued to an applicant who took the examination by mail would bear the designation "TECHNICIAN (C)". Section 97.35 provides that an individual who obtains his license through a volunteer-supervised examination is subject to retesting any time within the five-year term of the license. This is apparently the only difference in the privileges accorded licensees of the same overall class.

4. There is another disadvantage that might possibly affect the holder of a "(C)" or mail examination license. Section 97.25(a) provides that a licensee attempting to obtain a higher classification is required to pass only those elements of the higher class examination that were not included in the examination for the operator privileges he now holds. This provision, however, does not apply to the applicant who obtained his existing license through a mail, volunteer-supervised, examination. Thus, anyone holding a Technician Class authorization who desires to obtain a General Class license need take only the code test. The theory element would be waived since the same theory examination would have been passed when Technician operator privileges were obtained. If a licensee holding Technician (C) authorization desired to obtain General operating privileges no waiver of previously passed elements would occur. Both the code and theory elements would have to be taken.

5. *Events Prior to the Hearing.* The applicant, John Mihoevich, has held Novice and Technician (C) operator privileges in the Amateur Radio Service.[1] He was last issued

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[1] Mihoevich is also a Commercial Radio licensee of the Commission, holding a restrictive radiotelephone permit.

Amateur Radio Station and Technician (C) Operator licenses on January 2, 1969. This authorization expired on January 2, 1974, when Mihoevich failed to submit a timely application for renewal. However, on February 22, 1974 a renewal application was filed. The application consisted of an FCC Form 610 and an attached photocopy of his license (Bur. Ex. 1).[2]

6. On April 15, 1974 the Bureau sent a letter to Mihoevich informing him that the license document "did not contain the letter (C) following the Class of operator privileges" and requesting that he "fully explain any alteration" and furnish his original license (Bur. Ex. 2). Mihoevich responded immediately, enclosing his original license and stating: "The 'C' is on it"; "There has been no alteration" (Bur. Ex. 3).

7. Despite telephone calls to Commission personnel on June 6, July 17, July 30, August 14 and September 6, Mihoevich heard nothing further regarding his application until October 11, 1974 when he was informed that his previous letter was inadequate and that a further explanation for the omitted "(C)" would be necessary. The letter also noted that in the application Mihoevich had specified "Technician" without the notation "(C)" when describing his class of operator privileges (Bur. Ex. 4).

8. Mihoevich responded in a sworn statement dated October 17. He offered a possible explanation for copy machine malfunctioning which he had obtained from repairmen experienced in the field, *i.e.*, that the voltage in the machine may have been too high. As to his use of the word "Technician" in setting forth his classification, he noted correctly

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[2] Applicants for renewal are required to submit either their license or a copy as part of a renewal application.

that the form itself does not differentiate between "Technician" and "Technician (C)", but uses only the former in its list of license categories.[3] The letter concluded with a denial that any irregularities in the application were wilful and a request that the matter be favorably resolved as soon as possible, since the lack of a license was hindering Mihoevich's participation in a local civil defense communications group (Bur. Ex. 5).

9. The letter was deemed unsatisfactory by the Chief, Safety and Special Radio Services Bureau and the application was set for hearing on the issues set forth above (para. 1). Among other things the order states:

> The absence of the "(C)" on the photocopy of the license Mr. Mihoevich submitted with his renewal application raises the possibility that he may have submitted an altered license document so as to fradulently obtain a different grade of operator privileges. Moreover, Mr. Mihoevich's denial that any alteration was made and his suggestion that an unproper [sic] voltage caused the copying machine he used to omit a character requires the specification of an issue to determine whether Mr. Mihoevich has misrepresented material facts to the Commission.

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[3] The pertinent portion of the license form appears as follows:

5. A. ☐ *New* Operator and Primary Station License or *Change of Class* of Operator License (See Instruction D)

Check Class desired:

☐ Novice	☐ Technician	☐ Conditional
☐ General	☐ Advanced	☐ Amateur Extra

(continued)

In response to item 5.A. Mihoevich checked the box labeled "Technician" and typed the word "TECHNICIAN" in the space provided in item 5.E.for Class of Operator Privileges (Bur. Ex. 1).

10. *The Testimony.* At the hearing Mihoevich identified the FCC Form 610 as the renewal application he submitted to the Commission but was unable to positively identify the accompanying license document since it was a photocopy which lacked any original marks or signature. The photocopy Mihoevich submitted as part of his renewal application was made by him on a Xerox model 661 copying machine, Serial No. 283-021940, located at the Lawrence Livermore Laboratories where he was employed. Mihoevich testified that to the best of his recollection it was a first generation copy, *i.e.*, a copy of his original license document and not a copy of a copy.[4] However, expert witnesses called by the Bureau stated that a comparison of the original with the copy offered by the Bureau showed that the latter was at least a second generation copy.[5]

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[3] (continued)

5. F. ☐ *Additional* Station License: 1. ☐ Secondary 3. ☐ Repeater
For Present License give 2. ☐ Control 4. ☐ Auxilliary Link

Call Sign	Class of Operator Privileges	Expiration Date

(NOTE: An additional station license always expires on the same date as the basic operator and station license) See Instruction E.

[4] Mihoevich did say, however, that the copy machine frequently damaged the document being copied, so that people desiring more than one copy frequently used a copy of the original when making additional copies.

[5] There is an enlargement factor of about one percent in the copying process.

11. Mihoevich knew that the "(C)" designation indicated the license was obtained through a test administered by a volunteer supervisor rather than a Commission employee. He knew that he was subject to retesting at any time but assumed that all Amateur licensees were as well. Mihoevich also knew that as a Technician (C) he would have to pass both code and theory sections of the General examination to obtain General operator privileges, but that if he were a Technician he would have to pass only the code section. (See para. 4, *supra*.) About nine years ago Mihoevich failed a General operator examination but his shortcomings were in the code portion of the examination.[6] Finally, Mihoevich denied that he in any way caused the "(C)" not to appear on the license copy sent to the Commission and described in some detail his efforts to straighten the matter out so that his operating privileges could be reinstated. (See para. 7, *supra*.)

12. In addition to his own testimony Mihoevich offered that of two individuals active in local civil defense and RACES activities.[7] Each has known Mihoevich for many years and testified unequivocally as to his truthfulness and reliability. They also testified that Mihoevich has devoted considerable effort to the Communications Group of the Office of Emergency Services, and said that he is largely responsible for making the Communications Group a fully effective part of the Office of Emergency Services.

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[6] On this occasion Mihoevich sought to take the theory examination, after failing the code, but was told by a Commission official that there would be no purpose in doing so.

[7] Jean Tucker, Emergency Services Assistant for the City of Livermore, and Leonard Iverson, an engineer and Amateur licensee prominent in the local RACES group.

13. In mid-1973 the RACES group was considering establishing a repeater to make its communication network more efficient. Mihoevich helped prepare the RACES repeater application in late 1973 and early 1974. Neither Inverson nor Mihoevich was eligible to be a trustee for the RACES repeater because their license classification was not sufficiently high. Accordingly, they enlisted the aid of an Amateur Extra Class operator who was already trustee of the Livermore Radio Club station license. He agreed to be trustee of the repeater, and the application was filed in May 1974 and subsequently granted.

14. The Bureau offered the testimony of two expert witnesses: Gregory Lenhart, an employee of the Xerox Corporation with extensive knowledge of the operating characteristics of Xerox copying machines; and John Costain, Assistant Director of the Postal Inspection Service's Crime Laboratory and a specialist in the study and analysis of questioned documents. Their testimony is summarized in the following paragraphs.

15. The entire Xerox model 660 family of copying machines utilizes a dry process copying technique and ordinary bond paper. The original document is exposed to an electrostatically charged celinium drum upon which an image is created. The image is then transferred to the paper and permanently bonded to it. Lenhart's examination of the license copy submitted by the Bureau revealed no evidence that an erasure had occurred. He testified, however, that a copy machine of the type used by Mihoevich can malfunction and cause omissions of various sizes on the resulting copy. Through examination of the resulting copy and familiarity with the copying process the cause of the defect can "for the most part" be determined (Tr. 58). Mr. Lenhart characterized the size of the deleted notation "(C)" area as relatively small, and stated that there were "probably four main items" (Tr.

59) that might account for the deletion if it were the result of a malfunction in the machine: chipped drum, developer bead carryover, defective paper and optical obstruction. According to Lenhart, each of these malfunctions has certain characteristics or telltale signs that allow an experienced observer to determine the cause of the malfunction by examining the copy. None of these signs was detected in the Xerox copy of Mihoevich's license, leading Lenhart to conclude that the document from which the copy was made "probably did not have a C on it" (Tr. 64); *i.e.*, that machine failure was not a likely cause of the omission.

16. Costain confirmed Lenhart's conclusions regarding the absence of erasure marks on the original and the second generation nature of the license copy. (He thought it might even be a third generation copy.) Using an IBM dry process electrostatic copying machine and Mihoevich's original license Costain also demonstrated that evidence of the erasure of the notation "(C)" on a first generation copy would not appear on the second generation copy.

Findings of Ultimate Fact

17. The charge that a licensee deliberately altered and in effect falsified a document submitted in an application for renewal of license is a serious one. As the Bureau at one point reminded the applicant, it can amount to a violation of 18 U.S.C. 1001, and as such can result in a fine or imprisonment (see Bur. Ex. 4). Apart from this, full and complete disclosure is a cornerstone of the Commission's licensing scheme and an applicant who departs from this standard seriously jeopardizes his application, as the Commission has held in cases too numerous to require citation. However, because of the serious consequences which can flow therefrom, a finding of deliberate misrepresentation should be

made only on the basis of clear and convincing evidence. The presiding officer does not believe that the record in this case supports such a finding.

18. The record shows that the designation "(C)" does not appear after the word "TECHNICIAN" on the copy of the license produced by the Bureau at the hearing though it was in fact on the original. The record also shows that the copy, a second generation copy, did not bear telltale marks normally associated with copy machine malfunctionings. From this the Bureau hypothesizes that Mihoevich made a copy of his license, altered the copy to delete the "(C)", made a copy of the copy and submitted it to the Commission. He did so, according to the Bureau, to facilitate his obtaining a General Class license, since a Technician (but not a Technician(C)) is examined on code but not theory when seeking General operating privileges. Conceivably, this is what happened, but a finding to this effect would rest more on speculation than evidence.

19. Mihoevich repeatedly and convincingly denied under oath that he caused the "(C)" to be deleted from the document sent to the Commission. He seemed at all times to be an open and candid witness and his testimony as a whole was quite credible. The witnesses who appeared on his behalf portrayed him as a person of rectitude and good citizenship, and they impressed the presiding officer as individuals whose testimony is entitled to some weight.

20. Secondly, there is the question of motive. It must be realized that altering the license document is a pointless act. Like other federal, state and local licensing agencies the Commission maintains its own records, and these records, not a document in the possession of the licensee, determine his status. There is no reason to suppose Mihoevich, like any

other reasonably aware individual, would not have appreciated this.[8] Even apart from this there would seem little reason for Mihoevich to delete the "(C)" from the license copy. The only difference between a Technician and a Technician (C) is that a holder of the latter authorization is subject to retesting during the license term. Mihoevich, however, was under the impression that all licensees were subject to this requirement, so in his own mind there would seem nothing to be gained in this regard by deleting the "(C)". In any event, retesting is apparently a rare occurrence and the possible disadvantage of being subject to this procedure simply seems too remote and unimportant to warrant undertaking the risk involved in attempting to perpetrate fraud on the Commission.

21. The Bureau also points out that if Mihoevich's status were changed from Technician(C) to Technician and if he sought a General Class license, his examination would be less comprehensive in that only the code element of the General Class test would have to be taken. There is evidence (volunteered, incidentally, by Mihoevich and Iverson) that a General Class license would be useful to Mihoevich in his emergency and civil defense activities, and that some years ago he had applied for such an authorization. However, he failed to pass the code test, and this part of the exam he would have to take again whether his existing authorization were Technician or Technician(C). Once more, the potential advantage to the applicant seems too insignificant to justify the trouble and the risk involved in the deception postulated by the Bureau.

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[8] Indeed the "(C)"at issue here is a designation that is primarily for the use of the Commission; it has no bearing on the holder's operating privileges but serves to identify licensees who qualified by taking the examination by mail and are thus subject to retesting.

22. To support its theory that the document was deliberately altered the Bureau attaches considerable significance to the fact that the copy produced at the hearing was a second generation copy, not one made from the original. It contends that Mihoevich, in testifying that he sent in a copy of the original, was lying to conceal the fact that there was an intervening copy from which, so the argument goes, he deleted the "(C)". It should be noted, however, that Mihoevich was not unequivocal in his testimony. It was based on his best recollection, but from the circumstances he described (see n. 4, *supra*), it is possible that the document he submitted was a copy of a copy, and he himself did not rule out the possibility. It is also possible that Mihoevich is correct in his recollection, and that the document introduced by the Bureau was a copy of the one it received, made – in all innocence – by Commission processing personnel long before the case assumed its present proportions. Mihoevich could not identify it as the copy he submitted and the Bureau established no chain of possession to show that it was actually the document received with the application.[9] In sum the fact that the document introduced at the hearing was a second generation copy is consistent with the Bureau's theory of the case but does not lend independent support to its contention that there was a deliberate falsification.

23. In the last analysis the only real indication that Mihoevich falsified data submitted with his renewal application lies in the fact that the copy of the license produced at the hearing did not have the designation "(C)" after the word

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[9] In its response to certain interrogatories served prior to the hearing, the Bureau stated that the identity of the Commission employees who processed the application was not known.

"TECHNICIAN".[10] An expert witness testified that this omission was not accompanied by markings usually associated with machine failure.[11] But the real impact of his testimony was that copying failures do occur with greater frequency than one might imagine. The possibility that it occurred here cannot be ruled out, particularly in the face of the applicant's sworn denials that a deliberate alteration was made and the lack of persuasive evidence of any significant motive – apparent or real – for the deletion.

24. This is the third case in recent months in which the presiding officer has encountered essentially the same factual situation, *i.e.*, a missing "(C)" on the license document tendered with a renewal application.[12] Though it processes thousands of applications annually the Bureau may feel that a pattern of conduct is being revealed and that to preserve the integrity of its processes a full hearing is necessary before such applications can be granted. However, given the resources available to the litigants and the nature of the issue, it appears that the record developed will invariably be unsatisfactory. Seemingly, the Bureau can do little except establish the discrepancy in the license document, produce expert

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[10] The Bureau's contention that Mihoevich's use of the term "Technician" rather than "Technician(C)" in his renewal application form constitutes misrepresentation must be rejected. Given the context, *i.e.*, the form itself, Mihoevich's resonse was perfectly natural. While the Bureau may quibble with the accuracy of the answer, in the circumstances it cannot conceivably be called misrepresentation. (See n. 3, *supra.*)

[11] He also conceded that certain indications of a defective copier would be less likely to appear on a second generation copy.

[12] The others are *Charles Leo Suggs* (Docket No. 20416), Initial Decision released October 24, 1975 (FCC 75D-55); and *Richard A. Bonofiglio* (Docket No. 20431), Initial Decision pending.

testimony that it is apparently not a result of machine malfunctioning and attempt to establish a motive for the deception. The applicant can do little but deny that an intentional alteration was made, point to a lack of motive, and offer evidence of good character. The presiding officer is convinced that where (1) no substantial motive for deception is shown, (2) the applicant denies under oath that an alteration was made, and (3) his overall testimony and demeanor provide no basis for disbelieving him, the testimony of one or more expert witnesses that the discrepancy was probably not machine-caused is not sufficient to warrant a denial of the application.

Conclusions

25. In light of the evidence adduced under the factual issues specified for hearing and the findings reached above, it is concluded (1) that the applicant did not falsify the document submitted with his application and did not make material misrepresentations with respect thereto; (2) that the applicant is qualified to be a Commission licensee; and (3) that the public interest would be served by a grant of his application for renewal of license.

Accordingly, IT IS ORDERED, That, unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the rules,

the application of John Mihoevich for renewal of license IS GRANTED.[13]

/s/ JOHN H. CONLIN
John H. Conlin
Administrative Law Judge
Federal Communications Commission

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[13] In the event exceptions are not filed and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276 (d).

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1246

STAR BROADCASTING, INC., CENTRAL STATES BROADCASTING, INC., AND STAR STATIONS OF INDIANA, INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND INDIANAPOLIS BROADCASTING, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The court of appeals rendered no opinion. The decision of the Federal Communications Commission (Pet. App. 58a-76a) is reported at 51 F.C.C. 2d 95, and the initial decision of the Commission's Administrative Law Judge (Pet. App. 1a-57a) is reported at 51 F.C.C. 2d 114. An earlier decision of the Commission is reported at 40 F.C.C. 2d 623.

JURISDICTION

The judgment of the court of appeals (Pet. App. 77a-78a) was entered on December 11, 1975. A timely

petition for rehearing and suggestion of rehearing *en banc* was denied on January 20, 1976. The petition for a writ of certiorari was filed on March 3, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Commission must find that there is "clear and convincing" evidence of broadcaster misconduct as a precondition to deciding not to renew a broadcast license.

2. Whether a decision to deny the renewal of broadcast licenses should be set aside because the Commission did not conduct an investigation to determine whether the decision of former members of the Commission to investigate allegations of misconduct by the licensees had been influenced by congressional pressure.

STATUTES INVOLVED

Title III of the Communications Act of 1934, 48 Stat. 1081, as amended, 47 U.S.C. 301 *et seq.*:

47 U.S.C. 301 provides in relevant part:

> It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. * * *

47 U.S.C. 308 provides in relevant part:

> (a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: * * *

(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. * * *

* * * * *

47 U.S.C. 309 provides in relevant part:

(a) Consideration in granting application.

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * * * *

(e) Hearings; intervention; evidence; burden of proof.

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground

or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

* * * * *

STATEMENT

Petitioners are licensees of radio stations located in Indianapolis, Indiana; Omaha, Nebraska; and Vancouver, Washington. Each petitioner is a wholly owned subsidiary of Star Stations, Inc. Don W. Burden is chairman, president and owner of 92.3 percent of the stock of Star Stations, Inc. ("Star") (Pet. App. 5a).

After Burden acquired the Indianapolis stations the Commission concluded that they had used an audience

survey rating in a misleading manner and had conducted contests and billed advertisers in an improper manner (Pet. App. 59a-60a). It therefore renewed the stations' licenses for two brief "probationary" periods. The Commission discovered during these probationary periods that other serious misconduct might have occurred in connection with the operation of Star's stations. The Commission accordingly directed that applications for license renewals covering each of the stations be consolidated for a full evidentiary hearing (*ibid.*). The consolidated proceeding also encompassed a competing application for the AM license in Indianapolis (*id.* at 58a).

The initial decision of the Administrative Law Judge concluded that the AM license in Indianapolis should be awarded to the competing applicant and that the other Star licenses should be renewed (Pet. App. 57a). His decision to award one license to the competing applicant was based in large part upon findings that the station had made an illegal campaign contribution by entering into a sham contract for spot political advertisements with no expectation of repayment, and that the station had slanted its news coverage to favor that candidate (Pet. App. 40a, 41a, 56a).

The Administrative Law Judge found that "higher management" was chargeable with knowledge of the distorted newscasts (Pet. App. 41a). He declined, however, to find that Burden was a party to the spot announcement scheme (Pet. App. 40a). He discounted the testimony of the principal witnesses who had implicated Burden (Pet. App. 8a-9a). He acknowledged that other evidence raises "suspicions * * * as to Burden's participation" (Pet. App. 12a) but declared that "the evidence does not support a firm finding that Don Burden was party to or cognizant of the arrangement at the time the spots were broadcast" (Pet. App. 13a).

Similar allegations of an illegal corporate contribution and slanted news reporting by the Vancouver station had been raised with respect to an Oregon Senate campaign. The Administrative Law Judge concluded that the reporting did not violate the fairness doctrine and that the evidence did not establish that the alleged illegal contribution had been made (Pet. App. 16a-20a).

The Administrative Law Judge concluded that Burden had taken steps toward making political contributions to members of a zoning board in order to expedite plans to move the Vancouver stations' transmitter. Burden had withdrawn $10,000 in cash from the corporate treasury to make the contributions, but approval was granted before Burden disbursed the money (Pet. App. 20a). The Administrative Law Judge concluded that this incident has no "decisional significance" because "the record does not reveal what Burden planned on doing with the money" (Pet. App. 44a).

The Commission adopted many of the Administrative Law Judge's findings (Pet. App. 60a). It thoroughly reconsidered, however, the grounds upon which he had discounted the testimony concerning Burden's involvement in his stations' misconduct (Pet. App. 60a-70a);[1] it concluded that Burden was intimately involved and that Burden had perjured himself repeatedly in representing to the contrary (Pet. App. 68a). It also found that Burden endeavored to give one-sided coverage of the

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[1]The Commission's decision to set aside the Judge's factual findings was not based entirely upon a different evaluation of the credibility of the principal witness, Ron Mercer, who had been the general manager of one of Star's stations. It did not uncritically accept Mercer's testimony. Rather, the Commission considered his testimony in light of all the other circumstantial and testimonial evidence and found that Mercer's testimony "comports with" the other evidence "and Burden's denials of involvement in the scheme do not" (Pet. App. 67a).

Oregon Senate campaign, and that his denial that he made a political contribution from the corporate treasury during that campaign is contrary to the weight of the evidence (Pet. App. 68a-70a). Moreover, the zoning incident did have some "decisional significance" in the Commission's view. The Commission found that Burden "undertook a scheme to attempt to influence the action of local officials on KISN's rezoning proposal by contributing $10,000 to their campaign funds; and he took overt steps to complete this scheme" (Pet. App. 71a). Finally, the Commission found that the licensees had engaged in other instances of misconduct (Pet. App. 70a-72a).

The Commission concluded (Pet. App. 72a): "In view of the pervasive and continuing misconduct demonstrated in Burden's operations of his stations, it is clear that Star and Burden lack the requisite qualifications to be licensees of this Commission and that the evidence of record requires the denial of each of Star's renewal applications in this proceeding."

The court of appeals affirmed the Commission's order without opinion. Its *per curiam* order stated that it found "no basis in the record for disturbing the decision of the * * * Commission" (Pet. App. 78a).

ARGUMENT

The decision of the court of appeals is correct. This case does not present any question of general importance requiring review by this Court.

1. The Commission's decision that petitioners do not have the requisite character qualifications to act as broadcast licensees is supported by substantial evidence, and petitioners do not seriously contend otherwise. Instead, they contend that the Commission cannot deny an application to renew a license unless it finds on the

basis of "clear and convincing" evidence that the renewal applicant does not possess the necessary qualifications.

There is no support for this argument in the statute or in any case. Denial of a license renewal application is not a penal measure. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223. It is not a deprivation of "property," because a licensee's right to broadcast terminates when his license expires. 47 U.S.C. 301; *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367.[2] Cf. *Board of Regents* v. *Roth*, 408 U.S. 564. When a license expires the applicant for renewal has the burden of demonstrating that the public interest, convenience and necessity would be served by granting to it a license to operate for an additional period. 47 U.S.C. 309(e).

In view of the nature of a renewal proceeding, the application of a "clear and convincing evidence" standard would be inappropriate and contrary to the governing statutes. Cases cited by petitioners (Pet. 12), which adopt such a standard when the government initiates a proceeding to deprive an individual of liberty or property he then enjoys, do not pertain to renewal applicants; a renewal applicant does not have a "right to renew" that can be "extinguished" only under limited circumstances.

Petitioners' assertion that the difference between a decision to revoke a license during its term and a decision not to renew a license is a matter of "form, not substance" (Pet. 14) misconceives the nature of

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[2]The Chief Justice has observed: "A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; * * * a broadcast license is a public trust subject to termination for breach of duty." *Office of Communication of the United Church of Christ* v. *Federal Communications Commission*, 359 F.2d 994, 1003 (C.A. D.C.).

a renewal proceeding and runs afoul of the statutory requirement (47 U.S.C. 301, 309(a) and (d)) that a renewal applicant has the burden of proof. See *Office of Communication of the United Church of Christ* v. *Federal Communications Commission*, 425 F.2d 543, 549-550 (C.A. D.C.).

2. Petitioner alleges (Pet. 15) that the Commission's decision may have been infected by the notoriety engendered by congressional interest in the Commission's 1969 "probationary" license renewal of WIFE and WIFE-FM. This is nothing but speculation. After the Commission granted the probationary renewal in 1969 (19 F.C.C. 2d 991), it declined to comply with a congressional subpoena of the Commission's records. The Commission believed that the subpoena was premature, for the proceeding was still in an adjudicatory posture and subject to reconsideration. 47 U.S.C. 405. By resisting this subpoena the Commission successfully maintained the integrity of its administrative proceeding and avoided the type of improper congressional intrusion found to exist in *Pillsbury Co.* v. *Federal Trade Commission*, 354 F. 2d 952 (C.A. 5).

After the statutory period for reconsideration had expired, the Commission's staff presented to the Commission additional information (developed during the earlier hearing) that reflected on Star's qualifications to operate its stations. Congress initiated its own investigation of Star, and the Commission conducted both informal and formal investigations. 47 U.S.C. 403. The Commission ultimately commenced the present renewal hearing. Members of the Commission's staff who had coordinated matters with the congressional inquiry have taken no role in the renewal proceedings. There is simply no reason to suppose that the outcome of the present proceedings had been influenced by the earlier congressional interest, and a

formal hearing on this question was unnecessary.[3] Cf. *South Terminal Corp.* v. *Environmental Protection Agency*, 504 F.2d 646, 675 (C.A. 1).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

CARL D. LAWSON,
Attorney.

ASHTON R. HARDY,
General Counsel.

DANIEL M. ARMSTRONG,
Associate General Counsel.

SHELDON GUTTMANN,
Counsel,
Federal Communications Commission.

MAY 1976.

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[3]Petitioners' reliance on cases such as *Amos Treat & Co.* v. *Securities and Exchange Commission*, 306 F.2d 260 (C.A. D.C.); *Securities and Exchange Commission* v. *R.A. Holman & Co.*, 323 F.2d 284 (C.A. D.C.); *WKAT, Inc.* v. *Federal Communications Commission*, 258 F.2d 418 (C.A. D.C.); *Massachusetts Bay Telecasters* v. *Federal Communications Commission*, 261 F.2d 55 (C.A. D.C.); and *WORZ, Inc.* v. *Federal Communications Commission*, 268 F.2d 889 (C.A. D.C.), is misplaced. In each of those cases allegations were raised concerning improper contacts with a Commissioner participating in a particular proceeding. Petitioner does not claim that it has evidence of any improper contact with a Commissioner. Moreover, if such a contact had occurred at the time of the congressional investigation it could not have affected the validity of the Commission's decision to deny the renewal applications. None of the Commissioners who voted to deny renewal was a member of the Commission at the time of the congressional investigation. In any event, any conflict among decisions of the same court of appeals would be for that court to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902.